

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

10:00 AM

**6:16-16993 Kevin Duy Nguyen**

**Chapter 7**

**#1.00** CONT Reaffirmation Agreement Between Debtor and Toyota Motor Credit Corporation re 2016 Toyota Corolla

From: 10/5/16

EH\_\_

Docket 11

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
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**Debtor(s):**

Kevin Duy Nguyen

Represented By  
Stephen H Darrow

**Trustee(s):**

Todd A. Frealy (TR)

Pro Se

**United States Bankruptcy Court  
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10:00 AM

**6:16-16642 Mike L Lerner and Lisa Grisaffi Lerner**

**Chapter 7**

**#2.00** Reaffirmation Agreement Between Debtor and Ally Bank re 2017 Hyundai Elantra

EH\_\_

Docket 17

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
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**Debtor(s):**

Mike L Lerner

Represented By  
Gene E O'Brien

**Joint Debtor(s):**

Lisa Grisaffi Lerner

Represented By  
Gene E O'Brien

**Trustee(s):**

Arturo Cisneros (TR)

Pro Se

**United States Bankruptcy Court  
Central District of California  
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**Wednesday, November 09, 2016**

**Hearing Room 303**

11:00 AM

**6:16-18165 Shannon Nicole Henderson**

**Chapter 7**

**#3.00 Motion to Reconsider Dismissal of Case**

EH\_\_

Docket 17

**Tentative Ruling:**

**11/9/16**

**BACKGROUND:**

Case Filed: 9/12/16

Case Dismissed: 9/30/16

Trustee issued Report of no Distribution on 10/03/16

Motion to Vacate Dismissal: 10/11/16

**DISCUSSION**

**Basis for Dismissal:** Case was dismissed for failure to sign the Statement of Financial Affairs.

**Grounds for vacating dismissal:** Debtor filed her case in pro per and thought she had filed all the required documents. Debtor has now provided a copy of the Certificate of Debtor Education which she believes was the basis for dismissal.

**TENTATIVE:**

Based on the fact that the Court did not officially provide notice to Debtor of what document was deficient, the Court will GRANT the Motion conditioned on the Debtor filing her signed Statement of Financial Affairs within 10 days.

**APPEARANCES REQUIRED.**

<b>Party Information</b>
--------------------------

**Debtor(s):**

Shannon Nicole Henderson

Pro Se

**United States Bankruptcy Court  
Central District of California  
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**CONT...      Shannon Nicole Henderson**

**Chapter 7**

**Movant(s):**

Shannon Nicole Henderson

Pro Se

**Trustee(s):**

Robert Whitmore (TR)

Pro Se

**United States Bankruptcy Court  
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11:00 AM

**6:16-17676 Brian Oriva**

**Chapter 7**

**#4.00** Motion to Dismiss Debtor

EH\_\_

Docket 10

**\*\*\* VACATED \*\*\* REASON: CASE DISMISSED 10/17/16**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
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**Debtor(s):**

Brian Oriva

Pro Se

**Movant(s):**

Brian Oriva

Pro Se

**Trustee(s):**

Lynda T. Bui (TR)

Pro Se

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11:00 AM

**6:16-16891 Lillian Lorraine Glenn**

**Chapter 7**

**#5.00** Motion to reconsider order and notice of dismissal for failure to file schedules and/or statements

EH\_\_

Docket 38

**Tentative Ruling:**

**11/9/2016**

**BACKGROUND**

On August 1, 2016, Lillian Lorraine Glenn (the "Debtor") filed for chapter 13 relief. The Debtor's case was converted to a case under chapter 7 on September 8, 2016. Prior to the conversion, on or about August 15, 2016, the Debtor was sent a "Notice to Filer" from the Clerk's Office because the Declaration regarding Income (Docket No. 12) was improperly filed as an interactive pdf file which can be changed by users in CM/ECF. The Debtor did not re-file the document and the case was subsequently dismissed on September 28, 2016.

On October 11, 2016, the Debtor filed a Motion to vacate the dismissal. Service was proper and no opposition has been filed.

**DISCUSSION**

Debtor moves to vacate dismissal of her case pursuant to FRCP 60(b). Under FRCP 60(b)(1), an order may be vacated on the grounds of mistake, inadvertence and excusable neglect or alternatively, under FRCP 60(b)(6) for any other reason justifying relief.

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**CONT... Lillian Lorraine Glenn**

**Chapter 7**

**Excusable Neglect Standard**

In Bateman v. U.S. Postal Service, 231 F.3d 1220 (9th Cir.2000), the Ninth Circuit laid out the four factor test for determining whether grounds for excusable neglect exist as follows: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith.

Here, the Debtor has provided sufficient evidence for the Court to determine that grounds exist for vacating of the dismissal order. In particular, (1) the Debtor did not delay in seeking to vacate the dismissal, (2) the dismissal was based on an error committed by the Debtor's prior counsel and not noticed by the Debtor's current counsel (which was substituted into the case on or about September 7, 2016), and there is no evidence that the Debtor acted in anything other than good faith.

**TENTATIVE RULING**

Based on the foregoing, the Court is inclined to GRANT the Motion and vacate the dismissal. However, the Debtor has not yet re-filed LBR Form F1002-1, the Declaration by Debtor as to Whether Debtor Received Income From an Employer within 60 days.

The Debtor is directed to lodge an order (1) granting the Motion (2) vacating the dismissal and (3) providing that the Clerk of Court is directed to dismiss the case if the "Declaration by Debtor as to Whether Debtor Received Income From an Employer within 60 days is not filed" within 10 days of entry of the order.

APPEARANCES WAIVED.

<b>Party Information</b>
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**Debtor(s):**

Lillian Lorraine Glenn

Represented By  
Javier H Castillo

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**CONT... Lillian Lorraine Glenn**

**Chapter 7**

**Movant(s):**

Lillian Lorraine Glenn

Represented By  
Javier H Castillo

**Trustee(s):**

Larry D Simons (TR)

Pro Se

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**6:16-16275 Kum Hee Choi**

**Chapter 7**

**#6.00** Motion to Avoid Lien Real Property with Daimler Trust

Also #7

EH\_\_

Docket 44

**\*\*\* VACATED \*\*\* REASON: SET IN ERROR DUE TO INCORRECT  
EVENT CODE BY CREDITOR**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Kum Hee Choi

Represented By  
David Marh  
Andy J Epstein

**Movant(s):**

Kum Hee Choi

Represented By  
David Marh  
Andy J Epstein

**Trustee(s):**

Todd A. Frealy (TR)

Pro Se

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11:00 AM

**6:16-16275 Kum Hee Choi**

**Chapter 7**

**#7.00** CONT Motion to avoid lien under 11 U.S.C. sec 522(f) with Daimler Trust

From: 9/28/16, 11/2/16

Also #6

EH\_\_

Docket 10

**Tentative Ruling:**

**11/09/2016**

**background**

On July 14, 2016 (the "Petition Date"), Kum Hee Choi ("Debtor") filed her petition for chapter 7 relief. On August 17, 2016, the Debtor filed a motion to avoid lien the lien of Daimler Trust on the Debtor's primary residence located at 14576 Emerald Canyon Ct., Corona CA 92880 (the "Property") under § 522(f) (the "Motion"). On September 28, 2016, the Court held an initial hearing on the Debtor's Motion. The hearing was continued for the Debtor to provide:

1. Evidence of all liens encumbering the Property;
2. Evidence of the value of the Property; and
3. Evidence and Points and Authorities regarding Daimler's position

The Court ordered the Debtor's supplemental evidence and briefing by October 19, 2016, and Daimler's supplemental opposition by November 2, 2016.

On October 12, 2016, the Debtor amended Schedule I to reflect \$1,500 in monthly income received as support income for caring for elderly parents. The Debtor's prior Schedule I filed on the date of her petition indicated support income for the care of her elderly parents in the amount of \$3,000 per month.

The Debtor filed his supplemental brief and Amended Schedule C on October 19, 2016, and filed supplemental exhibits on October 20, 2016. On October 24, 2016, the Debtor filed a second supplemental brief (Docket No. 44). A review of the second

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**Chapter 7**

supplemental brief indicates that it is a duplicate of the October 19, 2016, filing. As such, the Court shall disregard Docket No. 44 as both untimely, and duplicative. On November 2, 2016, Daimler timely filed its supplemental opposition.

**DISCUSSION**

Pursuant to 11 U.S.C. § 522(f), judicial or nonpossessory, nonpurchase money security interest liens are avoided only to the extent they impair an exemption claimed by the debtor in the bankruptcy case.

A lien "impairs" an exemption to the extent that:

- the amount of the lien,
- plus the amount of all other liens on the property,
- plus the amount the debtor could claim as exempt if there were no liens on the property,

exceeds the value the debtor's interest in the property would have in the absence of any liens.

*In re Higgins*, 201 BR 965, 967 (9th Cir. BAP 1996).

Here, the Debtor has provided evidence of the following liens encumbering the Property: (1) the lien of Bank of America in the amount of \$414,639.33, (2) the lien of Real Time Resolutions in the amount of \$66,774, and (3) the judgment lien of Daimler in the amount of \$18,727.85. The total amount of these liens equals \$500,414.18. The Debtor asserts an exemption on the Property in the amount of \$148,586.67 according to her Amended Schedule C. Thus, the total amount of all liens plus the Debtor's asserted exemption equals \$648,727.85. As to the fair market value of the Property, the Debtor asserts a value of \$630,000 based on a broker's price opinion. Assuming the Debtor prevails on her asserted figures, the lien of Daimler would be subject to avoidance in its entirety as impairing the Debtor's exemption in the Property.

In response, Daimler argues that at the time the Motion was filed, the Debtor did not qualify for an exemption of more than \$75,000 because on the Petition Date her income exceeded the \$25,000 annual cap that permits a person over the age of 55 to claim a higher exemption. On October 12, 2016, the Debtor amended Schedules I and J to reflect an annual income that is now below the \$25,000 cap. Daimler argues that the Debtor's recent amendment of Schedule I subsequent to the initial hearing

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**Kum Hee Choi**

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was made in bad faith. Specifically, Daimler argues that the Debtor (without explanation) reduced her income for the purpose of asserting a larger exemption in the Property, sufficient to avoid the lien of Daimler.

In support of the new figures, the Debtor has provided declarations from her siblings to support her amended I income figure. However, these declarations are self-serving. Neither the declarations of the Debtor's siblings, nor the Debtor's own declaration provide any explanation as to why the Debtor expected she would receive \$3,000 per month from her siblings on the Petition Date versus the current expectation that their contributions will be reduced by fully one half to \$1,500 per month. Additionally, the Debtor has provided no historical evidence from the past year (e.g. past bank statements, or cancelled checks) to support the \$1,500 figure. Finally, the Court notes that the Debtor has also reduced her expenses in Schedule J. However, there is no explanation as to why her expenses have decreased. For example, the Debtor now indicates she is paying \$1,900 in rent or mortgage payments versus \$960 on the Petition Date; also the Debtor is no longer making monthly car payments but has not indicated whether the car was sold, surrendered, or paid off. Without more evidence and explanation, Schedule J may have been reduced for the sole purpose of making the concurrent reduction in income appear reasonable.

The Court notes that although Daimler may be correct that the Debtor was not entitled to the exemption claimed at the outset, it did not timely object to the Debtor's claimed homestead objection within the time limits set forth under FRBP 4003. However, the Court also notes that the Debtor's recent amendment may have triggered a new objection period as to the Debtor's homestead exemption.

**TENTATIVE RULING**

Based on the foregoing, the Court is inclined to DENY the Motion for a lack of sufficient evidence that the Debtor's current annual income is below the threshold that would permit her to claim the higher exemption. The denial is without prejudice to the Debtor refile the Motion if no objection is filed to her October 19, 2016, claimed exemption.

**APPEARANCES REQUIRED.**

**9/28/16**

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**CONT... Kum Hee Choi**

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**Tentative Ruling**

Service is improper because Debtor failed serve the motion, notice, and supporting papers on any other holder of a lien or encumbrance against the subject property (Bank of America, and Real Time Resolution), as required by LBR 4003-2(c) (2).

Debtor has provided insufficient evidence regarding the fair market value of the Property, because Debtor's declaration does not establish that he has personal knowledge regarding the fair market value of the Property.

Debtor does not provide sufficient evidence regarding the identity of any holder of a lien encumbering the subject property and the amount due and owing on such lien, as required by LBR 4003-2(d).

The Court also notes that neither Debtor nor Debtor's counsel's signature are dated, and that Debtor's signature is with a /s/ (Debtor's Electronic Signature), but there is no Electronic Filing Declaration as required by the Local Rules and Court Manual.

Based on the foregoing, the Court is inclined to CONTINUE the matter as an evidentiary hearing to determine the amount of Debtor's homestead exemption, and also to correct the deficiencies noted above.

The Court notes that the deadline to object to Debtor's exemption is October 6, 2016.

**APPEARANCES REQUIRED.**

<b>Party Information</b>
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**Debtor(s):**

Kum Hee Choi

Represented By  
David Marh  
Andy J Epstein

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**CONT... Kum Hee Choi**

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**Movant(s):**

Kum Hee Choi

Represented By  
David Marh  
Andy J Epstein

**Trustee(s):**

Todd A. Frealy (TR)

Pro Se

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11:00 AM

**6:15-11774 David K Fishbeck**

**Chapter 7**

**#8.00** Motion and Notice of Motion Objecting to and for Disallowance of Debtor's Claim of Homestead Exemption

Also #9

EH\_\_

Docket 42

**\*\*\* VACATED \*\*\* REASON: WITHDRAWAL OF MOTION FLD  
9/27/16**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

David K Fishbeck

Represented By  
Stephen H Darrow

**Movant(s):**

Karl T Anderson (TR)

Represented By  
Hydee J Riggs

**Trustee(s):**

Karl T Anderson (TR)

Represented By  
Hydee J Riggs

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11:00 AM

**6:15-11774    David K Fishbeck**

**Chapter 7**

**#9.00**    Motion Objecting to and for Disallowance of debtor's Amended Claim of Homestead Exemption

Also #8

EH\_\_

Docket      47

**\*\*\* VACATED \*\*\*    REASON: WITHDRAWAL OF MOTION FLD  
11/1/16**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

David K Fishbeck

Represented By  
Stephen H Darrow

**Movant(s):**

Karl T Anderson (TR)

Represented By  
Hydee J Riggs

**Trustee(s):**

Karl T Anderson (TR)

Represented By  
Hydee J Riggs

**United States Bankruptcy Court  
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**Wednesday, November 09, 2016**

**Hearing Room 303**

11:00 AM

**6:14-23544 S.T.I. Inc. Trucking and Materials**

**Chapter 7**

**#10.00** Motion For Sale of Property of the Estate under Section 363(b) - No Fee - Motion for Order: (1) Authorizing Sale of Estate's Right, Title and Interest in Personal Property; and (2) Approving Overbid Procedure

EH\_\_

Docket 197

**Tentative Ruling:**

**11/09/2016**

**BACKGROUND**

On November 3, 2014, S.T.I. Inc. Trucking and Materials ("Debtor") filed its petition for chapter 11 relief. The Debtor's case was converted to a case under chapter 7 on July 1, 2016. Todd Frealy is the duly appointed chapter 7 trustee ("Trustee").

Among the assets of the estate is certain heavy construction equipment used in connection with the Debtor's business of renting and operating heavy construction equipment (the "Property"). The Property is encumbered by the liens of Caterpillar, David Schultz, EDD, Productive Finance and Suretec Surety Company. The total of estimated liens on the Property is \$126,842.09, plus interest. The Trustee estimates that the auction value of the Property would yield \$112,700, not including costs of sale. The Trustee has received an offer to purchase the Property from Michael Tapozic ("Buyer"). Based thereon, the Trustee moves the Court for an order authorizing overbid procedures and authorizing the Trustee to sell the Property on an "as is, where is" basis and not as a sale that is free and clear of liens. Such sale shall yield at least \$25,000 in unencumbered funds to the Debtor's estate. The Trustee's motion for sale of the Property was filed on October 19, 2016. Service was proper and no opposition has been filed.

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**CONT... S.T.I. Inc. Trucking and Materials**

**Chapter 7**

**DISCUSSION**

**I. Sale of Estate Property Pursuant to Section 363(b)**

The trustee, after notice and a hearing, may sell property of the estate. 11 U.S.C. § 363(b)(1); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). The sale must be in the best interests of the estate and the price must be fair and reasonable. *In re Canyon Partnership*, 55 B.R. 520 (Bankr. S.D. Cal. 1985); *see also In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991)(sale must have fair/reasonable price, accurate/reasonable notice to creditors and sale made in good faith). The trustee must articulate some "business justification" for selling estate property out of the "ordinary course of business" before the court may approve the transaction. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Ernst Home Ctr., Inc.*, 209 B.R. 974, 979 (Bankr. W.D. Wash. 1997). Objections to sale that are based on inadequacy of price are often resolved the court ordering an auction, which may occur in open court. *Simantrob v. Claims Prosecutor, LLC (In re Lahijani)*, 325 B.R. 282, 287 (9th Cir. BAP 2005) *citing* Fed. R. Bankr. P. 6004(f).<sup>1</sup>

Here, as set forth above, the Trustee has proposed a sale which on an "as is, where is" basis for property that is currently overencumbered. The Trustee's proposed terms is likely to yield at least \$25,000 for creditors and is thus in the best interests of the estate. The proposed sale of the Property is not free and clear, but with all liens remaining on the Property.

**a) Bidding Procedures**

Generally, bidding procedures must be untainted by self-dealing, encourage bidding and be fair/reasonable/serve the best interests of the estate. *See In re Crown Corp.*, 679 F.2d 774 (9th Cir. 1982).

Here, the Trustee provided notice of the sale. However, the notice of sale incorrectly indicated that the sale would take place in Courtroom 302. The Trustee's proposed overbidding procedures are otherwise found to be reasonable and are

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**CONT...**      **S.T.I. Inc. Trucking and Materials**  
approved.

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**Tentative Ruling:**

Based on the foregoing, the Court is inclined to CONTINUE the hearing on the Sale Motion to December 7, 2016, at 11:00 a.m. for the Trustee to re-notice the sale of the Property with the correct location for overbidding. The Trustee must file and serve the amended Notice of Sale of Estate Property by November 16, 2016.

APPEARANCES REQUIRED. Trustee may appear telephonically.

<b>Party Information</b>
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**Debtor(s):**

S.T.I. Inc. Trucking and Materials

Represented By  
Stephen R Wade  
W. Derek May  
Amelia Puertas-Samara

**Movant(s):**

Todd A. Frealy (TR)

Represented By  
Anthony A Friedman  
Levene Neale Bender Yoo & Brill LLP

**Trustee(s):**

Todd A. Frealy (TR)

Represented By  
Anthony A Friedman  
Levene Neale Bender Yoo & Brill LLP

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**6:14-11765 Denise Barrow**

**Chapter 7**

**#11.00** CONT Order Adjudicating Marla Perez and PR Services Legal & Documentation Services in Contempt and Setting order to Show Cause Why Additional Remedies Should Not Be Imposed

From: 8/24/16, 9/21/16, 10/19/16

Also #11.1

EH\_\_

Docket 50

**Tentative Ruling:**

**08/24/2016**

**Background:**

On February 13, 2014, Denise Barrow (the "Debtor") filed a voluntary Chapter 7 bankruptcy petition. Marla Perez ("Perez") provided Bankruptcy Petition Preparer ("BPP") services on behalf of the Debtor.

While providing BPP services to Debtor, Perez violated multiple provisions of Section 110 of the Bankruptcy Code. Accordingly, on May 13, 2014, the U.S. Trustee ("UST") filed a motion against Perez seeking damages and the imposition of fines (the "Initial Motion"). Perez failed to file an opposition, and the Court granted the Initial Motion on June 11, 2014. Perez was ordered to refund \$200 to the Debtor and pay fines to the UST of \$500 based upon multiple violations of Section 110 (the "Initial Order"). Perez failed to pay the disgorgement and fines imposed in the Initial Order, and failed to contact the UST in any way concerning the required payments.

On August 5, 2015, UST filed a motion to re-open the Debtor's case to enable enforcement action against Perez. The order re-opening the Debtor's case was entered on August 7, 2015.

On August 7, 2015, the UST filed a motion requesting the Court to fine and enjoin Perez from providing petition preparer services until she complied with the Court's Initial order (the "Injunction Motion"). Perez failed to file an opposition, and

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did not appear at the hearing on the Injunction Motion. The Court entered an order granting the Injunction Motion (the "Injunction Order") on September 23, 2015, enjoining Perez from engaging in any petition preparer services, whether directly or indirectly or in any manner, until Perez complied with the Initial order and submitted proof of compliance to the Court. The Court further ordered that Perez pay an additional fine of \$500 to the U.S. Trustee.

After entry of the Injunction Order, the UST discovered that Perez had filed and/or prepared at least five, if not more, sets of bankruptcy documents in other cases. These cases include: *In re Artaega*, Case No. 6:16-bk-11606-SC, filed February 25, 2016; *In re Garcia*, Case No. 6:16-bk-10471-MH, filed January 20, 2016; *In re Macon*, Case No. 6:16-bk- 10079-MW, filed January 6, 2016; *In re Rodriguez*, Case No. 6:15-bk-21896-SC, filed December 10, 2015; and *In re Barrera*, Case No. 6:15-bk-19344-MJ, filed September 23, 2015 (collectively, the "Other Cases").

On March 23, 2016, UST brought a Motion for the issuance of an order to show cause ("OSC") as to why Perez should not be held in contempt of Court ("Motion for OSC"). The UST alleged that Perez should be found in contempt because: (1) Perez failed to tender the money sanctions to the UST pursuant to the Initial Order and the Injunction Order, and (2) Perez continued to provide BPP services in other bankruptcy case after entry of the Injunction Order.

On April 5, 2016, Perez filed an untimely opposition to the Motion for OSC ("Opposition"). The Opposition alleged that: (1) Perez paid her fines to the UST as instructed; (2) Perez was unaware that she was enjoined; and (3) Perez met with the UST on June 6, 2015, who promised not to bring further action against Perez. Perez provides a copy of a check made out to the United States Department of Justice in the amount of \$680.68 dated March 10, 2016 (the "Check"). Opposition Exh. A.

On April 8, 2016, the Court entered an order granting the Motion for OSC ("First OSC") and setting a hearing on the First OSC for May 4, 2016. The First OSC required Perez to file any supplemental response to the First OSC by April 20, 2016, and required that the UST's reply thereto be filed and served by April 27, 2016. The First OSC also required the UST to serve a copy of the OSC Order on Perez.

On April 26, 2016, the UST and Perez entered into a stipulation ("Stipulation") to continue the May 4, 2016, hearing on the OSC, because Perez had allegedly not been served with the First OSC. On April 28, 2016, the Court entered an order approving the Stipulation continuing the hearing on the First OSC to May 25,

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2016, and providing new deadlines for supplemental briefing in support of or in opposition to the First OSC.

On May 17, 2016, the UST filed a reply to the Opposition ("Reply"). The UST argued that pursuant to the Initial Order, Perez was ordered to deliver a money order to the U.S. Trustee's Riverside office by July 20, 2014, and the Check was issued on March 10, 2016, more than a year and a half after the July 20, 2014 deadline. Further, Perez owed \$1,000 in fines arising out of the instant case: \$500 from the Initial Order and \$500 from the Injunction Order. As such, Perez's payment of \$680.68 did not constitute full payment of the \$1,000 fine.

On July 14, 2016, the Court issued its Order Adjudicating Marla Perez and PR Services Legal & Documentation Services in Contempt and Setting Order to Show Cause why Additional Remedies Should not be Imposed ("Second OSC"). The Second OSC provided Perez with a deadline of August 3, 2016, to file a statement why the Second OSC should be purged. It further provided specific conditions for the purging of the Second OSC. Additionally, the Second OSC provided the UST with an award of reasonable attorney fees and costs incurred in connection with the contempt proceedings. Finally, the Second OSC indicated that failure to purge the contempt would constitute grounds for additional relief, including: (a) coercive daily fines of \$100 per day for every day Perez fails to purge the contempt; (b) additional reasonable attorney's fees and costs in favor of the UST; and (c) further relief as determined by the Court.

**Tentative:**

Perez failed to file the statement required by the Second OSC by the appointed deadline. There is as yet no evidence that Perez has taken any steps to purge the contempt. Based on Perez's failure to meet the conditions for purging of the contempt as set forth in the Second OSC, the Court will order sanctions against Perez in the amount of daily coercive fines requested by the UST. Additionally, the Court further orders that the UST shall be entitled to additional reasonable attorney's fees and costs associated with actions taken to secure compliance by Perez with this Court's prior orders.

**APPEARANCES REQUIRED.**

<b>Party Information</b>
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**CONT...      Denise Barrow**

**Chapter 7**

**Debtor(s):**

Denise Barrow

Pro Se

**Trustee(s):**

Howard B Grobstein (TR)

Pro Se

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Central District of California  
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**Hearing Room 303**

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**6:14-11765 Denise Barrow**

**Chapter 7**

**#11.10** Motion (1) Notice Of Third Continued Hearing On Order To Show Cause Why Additional Remedies Should Not Be Imposed And (2) Motion For Bodily Detention Order

Also #11

EH\_\_

Docket 59

**Tentative Ruling:**

**11/9/2016**

**Background:**

On February 13, 2014, Denise Barrow (the "Debtor") filed a voluntary Chapter 7 bankruptcy petition. Marla Perez ("Perez") provided Bankruptcy Petition Preparer ("BPP") services on behalf of the Debtor.

While providing BPP services to Debtor, Perez violated multiple provisions of Section 110 of the Bankruptcy Code. Accordingly, on May 13, 2014, the U.S. Trustee ("UST") filed a motion against Perez seeking damages and the imposition of fines (the "Initial Motion"). Perez failed to file an opposition, and the Court granted the Initial Motion on June 11, 2014. Perez was ordered to refund \$200 to the Debtor and pay fines to the UST of \$500 based upon multiple violations of Section 110 (the "Initial Order"). Perez failed to pay the disgorgement and fines imposed in the Initial Order, and failed to contact the UST in any way concerning the required payments.

On August 5, 2015, UST filed a motion to re-open the Debtor's case to enable enforcement action against Perez. The order re-opening the Debtor's case was entered on August 7, 2015.

On August 7, 2015, the UST filed a motion requesting the Court to fine and enjoin Perez from providing petition preparer services until she complied with the Court's Initial order (the "Injunction Motion"). Perez failed to file an opposition, and did not appear at the hearing on the Injunction Motion. The Court entered an order granting the Injunction Motion (the "Injunction Order") on September 23, 2015,

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enjoining Perez from engaging in any petition preparer services, whether directly or indirectly or in any manner, until Perez complied with the Initial order and submitted proof of compliance to the Court. The Court further ordered that Perez pay an additional fine of \$500 to the U.S. Trustee.

After entry of the Injunction Order, the UST discovered that Perez had filed and/or prepared at least five, if not more, sets of bankruptcy documents in other cases. These cases include: *In re Artaega*, Case No. 6:16-bk-11606-SC, filed February 25, 2016; *In re Garcia*, Case No. 6:16-bk-10471-MH, filed January 20, 2016; *In re Macon*, Case No. 6:16-bk- 10079-MW, filed January 6, 2016; *In re Rodriguez*, Case No. 6:15-bk-21896-SC, filed December 10, 2015; and *In re Barrera*, Case No. 6:15-bk-19344-MJ, filed September 23, 2015 (collectively, the "Other Cases").

On March 23, 2016, UST brought a Motion for the issuance of an order to show cause ("OSC") as to why Perez should not be held in contempt of Court ("Motion for OSC"). The UST alleged that Perez should be found in contempt because: (1) Perez failed to tender the money sanctions to the UST pursuant to the Initial Order and the Injunction Order, and (2) Perez continued to provide BPP services in other bankruptcy case after entry of the Injunction Order.

On April 5, 2016, Perez filed an untimely opposition to the Motion for OSC ("Opposition"). The Opposition alleged that: (1) Perez paid her fines to the UST as instructed; (2) Perez was unaware that she was enjoined; and (3) Perez met with the UST on June 6, 2015, who promised not to bring further action against Perez. Perez provides a copy of a check made out to the United States Department of Justice in the amount of \$680.68 dated March 10, 2016 (the "Check"). Opposition Exh. A.

On April 8, 2016, the Court entered an order granting the Motion for OSC ("First OSC") and setting a hearing on the First OSC for May 4, 2016. The First OSC required Perez to file any supplemental response to the First OSC by April 20, 2016, and required that the UST's reply thereto be filed and served by April 27, 2016. The First OSC also required the UST to serve a copy of the OSC Order on Perez.

On April 26, 2016, the UST and Perez entered into a stipulation ("Stipulation") to continue the May 4, 2016, hearing on the OSC, because Perez had allegedly not been served with the First OSC. On April 28, 2016, the Court entered an order approving the Stipulation continuing the hearing on the First OSC to May 25, 2016, and providing new deadlines for supplemental briefing in support of or in opposition to the First OSC.

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On May 17, 2016, the UST filed a reply to the Opposition ("Reply"). The UST argued that pursuant to the Initial Order, Perez was ordered to deliver a money order to the U.S. Trustee's Riverside office by July 20, 2014, and the Check was issued on March 10, 2016, more than a year and a half after the July 20, 2014 deadline. Further, Perez owed \$1,000 in fines arising out of the instant case: \$500 from the Initial Order and \$500 from the Injunction Order. As such, Perez's payment of \$680.68 did not constitute full payment of the \$1,000 fine.

On July 14, 2016, the Court issued its Order Adjudicating Marla Perez and PR Services Legal & Documentation Services in Contempt and Setting Order to Show Cause why Additional Remedies Should not be Imposed ("Second OSC"). The Second OSC provided Perez with a deadline of August 3, 2016, to file a statement why the Second OSC should be purged. It further provided specific conditions for the purging of the Second OSC. Additionally, the Second OSC provided the UST with an award of reasonable attorney fees and costs incurred in connection with the contempt proceedings. Finally, the Second OSC indicated that failure to purge the contempt would constitute grounds for additional relief, including: (a) coercive daily fines of \$100 per day for every day Perez fails to purge the contempt; (b) additional reasonable attorney's fees and costs in favor of the UST; and (c) further relief as determined by the Court.

On October 17, 2016, the UST filed its Motion for Bodily Detention Order ("Detention Motion"). In support of the Detention Motion, the UST notes that Perez has failed numerous times to comply with this Court's orders, including by failing to appear at two separate OSC hearings, by failing to file her statement as to why contempt should not be purged, and by her ongoing failure to fully pay fines owed pursuant to the Court's First OSC.

**Tentative:**

Perez has again failed to file any opposition to the UST's Motion or to otherwise demonstrate compliance with the Court's prior Orders to Show Cause. Additionally, as indicated by the UST, Perez has been on notice of the coercive daily fines imposed on her to elicit compliance. Notwithstanding these fines, Perez remains recalcitrant. Based on the foregoing, and following the authorities cited by the UST, the Court finds that issuance of a body detention order is warranted under § 105 to coerce Perez to comply with the Court's orders.

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APPEARANCES REQUIRED.

<b>Party Information</b>
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**Debtor(s):**

Denise Barrow

Pro Se

**Trustee(s):**

Howard B Grobstein (TR)

Pro Se

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**6:10-27784 Orlun K Jones and Estela Jones**

**Chapter 7**

**#12.00 Notice of Trustee's Final Report and Applications for Compensation**

EH\_\_

Docket 149

**Tentative Ruling:**

11/09/2016

No opposition has been filed.

Service was Proper.

This application for compensation has been set for hearing on the notice required by LBR 2016-1.

Between October 17, 2014, and May 11, 2014, Counsel for the Trustee incurred approximately \$5,530 for services related to the filing of a the Trustee's Motion for Order to Determine the Priority of Distribution (the "Distribution Motion"). A review of the letter from the AUSA Tompkins indicates that the Trustee's Counsel performed little to no research or drafting in preparing the Distribution Motion, and instead primarily adopted the research and lead of the Department of Justice in drafting and preparing the Motion. Based on a review of this category of work, the Court is inclined to reduce the \$5,530 by half to \$2,765.

Regarding the sale of the real properties at auction by the IRS, Counsel's Application indicates that \$4,340 and 12.4 hours were expended in attending the auctions. There is no indication of what benefit, if any, the Estate received from Counsel's attendance at the auctions. For this reason, the Court is inclined to reduce the amount of Counsel's Application by \$4,340.

In sum, the Court is inclined to reduce Counsel's total compensation by \$7,105.

Additionally, the Trustee having already reduced his statutory fees, and Trustee's Accountant Fees & Expenses appearing reasonable based on the services provided, the amounts requested by the Trustee and Accountant are allowed in full. Pursuant to the Trustee's Final Report, the following administrative claims will be allowed:

**Trustee's Request**

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**CONT... Orlun K Jones and Estela Jones**

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- |   |                  |
|---|------------------|
| 1. Fees Requested                               | \$ <u>10,760</u> |
| 2. Expenses Requested (tab summary of expenses) | \$ <u>183.06</u> |

**Attorney Request**

- |   |                  |
|---|------------------|
| 1. Fees Requested                               | \$ <u>10,809</u> |
| 2. Expenses Requested (tab summary of expenses) | \$ <u>526.95</u> |

**Accountant Request**

- |   |                    |
|---|--------------------|
| 1. Fees Requested                               | \$ <u>1,963.50</u> |
| 2. Expenses Requested (tab summary of expenses) | \$ <u>226.90</u>   |

APPEARANCES REQUIRED.

<b>Party Information</b>
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**Debtor(s):**

Orlun K Jones	Pro Se
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**Joint Debtor(s):**

Estela Jones	Pro Se
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**Trustee(s):**

John P Pringle (TR)	Represented By Toan B Chung Roquemoore Pringle & Moore Inc
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**6:13-13557 Michael Sevilla Santos and Maricar Domingo Santos**

**Chapter 7**

**#13.00 Motion to Convert Case From Chapter 7 to 13**

EH\_\_

Docket 69

**Tentative Ruling:**

**11/09/2016**

**BACKGROUND**

On February 28, 2013 ("Petition Date"), Michael and Maricar Santos (collectively, the "Debtors") filed their petition for chapter 7 relief. Larry Simons is the duly appointed chapter 7 trustee ("Trustee"). Among the assets of the bankruptcy estate is the Debtors' single family residence commonly known as 5689 Andover Way, Chino Hills, CA 91709 (the "Property").

On February 24, 2016, the Trustee filed a Motion for Turnover of the Property (the "First Turnover Motion"). The First Turnover Motion was granted by the Court and an order entered on April 14, 2016 (the "Turnover Order"). In connection with the granting of the First Turnover Motion, the Court entered Findings of Fact and Conclusions of Law which sets forth a brief history of the case. In particular, the dispute between the Debtors and the Trustee arose when following the Trustee's setting of a Trustee Final Report hearing and receiving an order on that report, the Trustee determined that sufficient equity existed in the Property to administer the asset for the benefit of creditors. The Debtors argued that the Trustee Final Report and order thereon constituted an abandonment of the Property. The Court found that the Property had not been abandoned and further ordered, in pertinent part, that:

1. The Debtors must turnover all necessary keys and alarm codes to access the Property to the Trustee within fifteen (15) days of the entry of the order; and
2. That the Trustee's real estate broker was authorized to show the Property Monday through Saturday, from 9 am to 6 pm, upon 24 hours email notice by the Trustee's Broker to the Debtors' counsel.

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On September 27, 2016, the Trustee filed a second motion for turnover (the "Second Turnover Motion") which the Court granted to the extent of requiring the Debtors to allow prospective buyers, appraisers, real estate professionals, and any other professionals and/or inspectors of the buyers, access to the Property.

On October 4, 2016, the Debtors filed the instant Motion to Convert ("Motion"). The Motion seeks authority from this Court to permit the Debtors to convert their case from a case under chapter 7 to a case under chapter 13.

**DISCUSSION**

**I. Improper Service**

Service was improper. Specifically, LBR 1017 and 9013-1(o), applicable to motions to convert from a chapter 7 case to a case under chapter 13, require notice and an opportunity to request a hearing for all parties that would be affected by the motion. Here, all creditors would potentially be affected by the Motion. However, the Debtors failed to provide notice of the Motion and failed to serve the Motion on their creditors. The Motion cannot be granted at this time on this basis alone.

**II. Eligibility for Chapter 13**

Chapter 13 relief is available only to a debtor with a "regular income [who] owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$394,725 and noncontingent, secured debts of less than \$1,184,200...." 11 U.S.C. § 109(e).

The Trustee opposes the Debtors' Motion on the grounds that the request for conversion is made in bad faith. Specifically, the Trustee argues that the Debtors should not be entitled to conversion because (1) they have failed to comply with this Court's order permitting the Trustee and his agents access to the Property; (2) the Debtors already received a discharge of all of their debts in the instant chapter 7 and have negligible income for purposes of conversion; and (3) the Debtors have not filed a proposed chapter 13 plan or otherwise indicated how they would pay the allowed unsecured claims (currently amounting to \$76,261.63), whereas the Trustee's proposed sale of the property and willingness to reduce administrative claims would

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result in these claims being potentially paid in full.

**Chapter 7**

In support, the Trustee has provided the Debtors' original schedules I and J, which reflect disposable income in the amount of \$10.29, and the Debtors' amended schedules I and J, which reflect disposable income in the amount of \$15.51.

The Court notes that on November 1, 2016, and seemingly in response to the Trustee's Opposition, the Debtors amended Schedules I and J again to reflect disposable income of \$5,011.60 per month. In their Reply, the Debtors assert that Michael Santos's average monthly income has increased in 2016 due to high commissions from his realtor work. They contend that these higher commissions are the result of improved market conditions. Additionally, the Debtors indicate that they have surrendered the rental property they were operating in Las Vegas which has reduced their monthly expenses by "over \$2,100 per month. The Debtors further assert that they are below the debt limit for a chapter 13 case.

The Trustee in his Surreply (which the Court shall consider for purposes of ruling on this Motion), indicates that a Motion by the Trustee for sale of the Property has now been filed which the Trustee believes will yield at least \$525,000. The Trustee further opposes the Motion on the basis that the Debtors' draft chapter 13 plan indicates that they may seek to sell or refinance the Property in which case the Trustee is not clear why the Debtors oppose the current sale.

**TENTATIVE RULING**

The Debtors have provided evidence that they are potentially able to propose a 100% plan that pays creditors and administrative expenses by means of a chapter 13 plan. However, while the Court certainly understands Debtors' desire to retain ownership of the Property, the question here is whether that desire, embodied in the request to convert, outweighs creditors' interests in being paid in full from the Trustee's

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proposed sale. Ultimately, any conversion will require protections that creditors interests are not prejudiced by conversion.

Separately, the Court is inclined to CONTINUE the instant hearing to December 30, 2016, at 11:00 a.m., for the Debtors to file and serve notice of the hearing, and an opportunity to object, to their creditors.

APPEARANCES REQUIRED.

<b>Party Information</b>
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**Debtor(s):**

Michael Sevilla Santos

Represented By  
Jeffrey B Smith

**Joint Debtor(s):**

Maricar Domingo Santos

Represented By  
Jeffrey B Smith

**Movant(s):**

Maricar Domingo Santos

Represented By  
Jeffrey B Smith  
Jeffrey B Smith

Michael Sevilla Santos

Represented By  
Jeffrey B Smith  
Jeffrey B Smith  
Jeffrey B Smith

**Trustee(s):**

Larry D Simons (TR)

Represented By  
Larry D Simons (TR)  
Wesley H Avery

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**6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat and**

**Chapter 7**

**#14.00** Application to Employ Fraley & Associates as Special Litigation Counsel

Also #15 - #17

EH\_\_

Docket 366

**Tentative Ruling:**

**11/09/2016**

**BACKGROUND**

On October 20, 2013 ("Petition Date"), Douglas J Roger, MD, Inc., a Professional Corporation ("DJRI" or the "Debtor") filed its petition for chapter 7 relief. Arturo Cisneros is the duly appointed chapter 7 trustee ("Trustee") for the bankruptcy estate of DJRI (the "Estate").

Among the creditors of the Debtor's bankruptcy estate is Revere Financial Corporation ("RFC"). From virtually the inception of the Debtor's case, RFC has been represented in the Debtor's bankruptcy proceedings by the firm of Fraley & Associates ("Fraley").

On October 20, 2015, the Trustee filed a complaint for avoidance and recovery of transfers made to Kajan Mather & Barish ("KMB"), Mather Kuwada, Mather Law Corp., Law Office of Kenneth Barish, Steven Mather, and Kenneth Barish pursuant to §§ 547 and 548 (the "Complaint"). During 2015, the Trustee and RFC became engaged in negotiations to resolve disputes between the Debtor's estate and RFC. In connection with these negotiations, the parties have indicated the potential that settlement would involve assignment of pending adversary proceedings filed by the Trustee to RFC as a liquidating trustee for the Debtor's estate. On August 26, 2016, to avoid incurring further costs to the estate from prosecution of the Complaint, and in

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contemplation of an eventual settlement with RFC, the Trustee filed a "Notice of Chapter 7 Trustee Association of Fraley & Associates" with respect to litigation of the Complaint.

On September 12, 2016, the Trustee formally filed his application to employ Fraley as Special Litigation Counsel (the "Application"). On September 26, 2016, KMB filed its objection to the Application (the "Objection"). On October 10, 2016, DJRI filed its joinder to the objection of KMB (an errata to the Joinder was filed on October 13, 2016). On November 2, 2016, the Trustee filed his Reply to the Objection ("Reply").

**DISCUSSION**

KMB objects to the Application on the following grounds:

1. KMB argues that Fraley holds an adverse interest to the bankruptcy estate due to its prior representation of RFC; and
2. Fraley cannot maintain its duty of undivided loyalty to both RFC and the Estate.

In support, KMB argues that Fraley has taken positions contrary to the Estate throughout the pendency of the bankruptcy; that Fraley's representation of RFC involves the "shielding" of RFC against claims against it which, if successful, would deprive the Estate of assets and property interests for creditors.

***KMB Has Identified No Actual Conflict by Virtue of Fraley's Representation of RFC***

Section 327(c) allows the appointment of counsel to represent the trustee, even where counsel represents a creditor, where the court finds no "actual conflict of interest." *Stoumbos v. Kilimnik*, 988 F.2d 949, 964 (9th Cir. 1993). Reasoning by analogy to section 327(e), several courts have held that, where the trustee seeks to appoint counsel only as "special counsel" for a specific matter, there need only be no conflict between the trustee and counsel's creditor client with respect to the specific

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matter itself. *Id. Fondiller v. Robertson (In re Fondiller)*, 15 B.R. 890, 892 (9th Cir.1981), appeal dismissed, 707 F.2d 441 (9th Cir.1983); *see also Altenberg v. Schiffer (In re Sally Shops, Inc.)*, 50 B.R. 264, 266 (Bankr.E.D.Pa.1985) (following *Fondiller*).

In *Fondiller*, the BAP explained the distinction between acting as a trustee's general counsel and acting as special counsel for the trustee as follows:

It should be borne in mind that general counsel for the trustee, in order to accomplish a maximum distribution to creditors, usually must perform services that are adverse to certain individual creditors. For example, creditors' claims should be reviewed to determine which should be disputed, or an investigation of pre-bankruptcy transactions between the debtor and individual creditors might be conducted for the purpose of determining whether a preference has occurred. An attorney representing the trustee as general counsel would be required to give legal advice and to proceed with appropriate litigation in connection with these matters. Any number of possible conflicts can be envisioned. The foregoing reasoning, however, does not apply to those situations in which an attorney's services are limited to a narrow field for a specific purpose.

*Fondiller* at 892. Thus, where the interest of the special counsel and the interest of the estate are identical with respect to the matter for which special counsel is retained, there is no conflict and the representation can stand. *In re AroChem Corp.*, 176 F.3d 610, 622 (2d Cir. 1999). The only determination to be made is whether – with respect to the special representation it has been hired to undertake – Fraley (1) holds or represents an interest that is adverse to the estate, and (2) is a "disinterested person." *Id.*

KMB asserts that Revere through the Fraley Firm can manipulate the estates of DJRI and Dr. Rogers through its concurrent representation of the Trustees in both cases. However, as this Court has previously observed, KMB's argument is tenuous as it has not identified any specific assets being disputed between the two estates that could result in such a conflict. Nor has KMB provided any evidence to suggest that

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Fraley's specific representation of the Trustee against KMB and related parties presents any actual conflict.

Next, KMB asserts that the compensation of Fraley by RFC requires "careful scrutiny" by the Court to ensure that it is reasonable, negotiated in good faith, and is necessary as a means of ensuring the engagement of competent counsel. In support of its contention, KMB cites to *In re Kelton Motors, Inc.*, 109 B.R. 641 (Bankr. D. Vt. 1989), which is readily distinguishable from the facts of this case. Kelton specifically involved the employment by a chapter 11 debtor-in-possession of an attorney being funded by the debtor's insiders. *Kelton* does not support KMB's attempt to have this Court impose standards on the Trustee's employment of Fraley that are not otherwise set forth under § 327.

The remainder of KMB's Objection attempts to further outline actual or potential conflicts of interest between Fraley's representation of RFC and its representation of the Estate, generally. However, KMB's arguments must fail for the simple reason that none of the asserted conflicts specifically addresses whether any conflict exists by virtue of Trustee's narrow Application which seeks employment of Fraley to prosecute the Complaint against KMB and related parties. For example, KMB points to the potential conflict involved in having counsel for Fraley testify in connection with litigation regarding disputes over RFC's interests. KMB asserts that Fraley's employment would thus put its attorneys in the position of having to work cooperatively with the Trustee on some matters while simultaneously taking a position adverse to him with respect to RFC's claims. KMB's argument is unconvincing. Even assuming, *arguendo*, that Fraley was simultaneously representing the Trustee's interest in litigating the KMB Complaint while having to take a position contrary to that of the Trustee in a separate proceeding on behalf of RFC, disqualification requires an actual conflict as to Fraley's employment to litigate the KMB Complaint. On this point, KMB has not identified any specific facts supporting the existence of an actual conflict between positions taken by Fraley on behalf of RFC and by the positions it is currently taking, or is likely to take against KMB on behalf of the Estate.

***The Objection of Dr. Roger on the Basis that Fraley received Privileged***

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*Information Reveals no Actual Conflict as between Fraley's representation of the  
Estate and RFC*

Dr. Roger objects to the Application primarily based on the argument that Fraley received privileged and confidential information relating to DJRI and Dr. Roger personally, via the KMB Complaint litigation, that creates a conflict stemming from Fraley's separate representation of the Estate of Dr. Roger (the individual). However, the test for an "actual conflict" is whether the representation by counsel of a creditor creates an actual conflict as to the specific purpose for which the trustee is seeking to employ counsel. On this point, Dr. Roger has failed to demonstrate how Fraley's representation of the Dr. Roger (individual) estate in seeking to deny Dr. Roger's discharge represents an actual conflict as to the interest of the DJRI Estate in obtaining recovery from KMB and its related parties. If Dr. Roger believes that Fraley has obtained and is using information acquired by virtue of Fraley's representation of the DJRI Estate, then his recourse is to file a motion to exclude evidence or to disqualify Fraley in the Dr. Roger (individual) case.

Finally, Dr. Roger has raised one issue in its objection which the Trustee has not addressed, which is whether Fraley's representation of RFC in its appeal, that seeks to have the DJRI bankruptcy case dismissed, create an actual conflict as to Fraley's representation of the Estate in prosecuting the KMB Complaint. The Court's inclination is to find that no actual conflict arises based on RFC's appeal because the prosecution of the KMB Complaint does not require Fraley to take the position that the bankruptcy is itself in the best interests of creditors. The Trustee and Fraley are to address this point at the hearing.

**TENTATIVE RULING**

Based on the foregoing, in addition to having independently found that the Application sufficiently complies with FRBP 2014 and LBR 2014 for employment of a professional person, and for the reasons set forth in the Trustee's Reply to the Objections of KMB and Dr. Roger, the Court is inclined to approve the Fraley's employment as set forth in the Application.

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APPEARANCES REQUIRED.**

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<b>Party Information</b>
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**Debtor(s):**

Douglas J Roger, MD, Inc., A

Represented By  
Summer M Shaw  
Michael S Kogan  
George Hanover

**Movant(s):**

Arturo Cisneros (TR)

Represented By  
Chad V Haes  
D Edward Hays

**Trustee(s):**

Arturo Cisneros (TR)

Represented By  
Chad V Haes  
D Edward Hays

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

11:00 AM

**6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat and**

**Chapter 7**

**#15.00** CONT Motion for Approval of Compromise Between Trustee and Douglas J Roger MD Inc Define Benefit Plan

From: 5/11/16, 6/8/16, 6/29/16, 8/31/16, 10/5/16

Also #14 - #17

EH\_\_

Docket 320

**\*\*\* VACATED \*\*\* REASON: CONTINUED TO 2/1/17 AT 11:00 A.M.**

**Tentative Ruling:**

05/11/2016

Based on the representations made to the Court by counsel for the Parties that negotiations are ongoing, and based on the consent of the Parties to a continuance, the Court shall CONTINUE the hearing on the Motion to June 8, 2016 at 11:00 a.m.

APPEARANCES ARE WAIVED.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Douglas J Roger, MD, Inc., A

Represented By  
Summer M Shaw  
Michael S Kogan  
George Hanover

**Movant(s):**

Arturo Cisneros (TR)

Represented By  
Chad V Haes  
D Edward Hays

**Trustee(s):**

Arturo Cisneros (TR)

Represented By

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

11:00 AM

**CONT...**

**Douglas J Roger, MD, Inc., A Professional Corporat and**

Chad V Haes

D Edward Hays

**Chapter 7**

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

11:00 AM

**6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat and**

**Chapter 7**

**#16.00** CONT Motion to Approve Compromise Under Rule 9019 between Trustee and Dr. Eric L. Freedman

From: 5/11/16, 6/8/16, 6/29/16, 8/31/16, 10/5/16

Also #14 - #17

EH\_\_

Docket 322

**\*\*\* VACATED \*\*\* REASON: CONTINUED TO 2/1/17 AT 11:00 A.M.**

**Tentative Ruling:**

05/11/2016

Based on the representations made to the Court by counsel for the Parties that negotiations are ongoing, and based on the consent of the Parties to a continuance, the Court shall CONTINUE the hearing on the Motion to June 8, 2016 at 11:00 a.m.

APPEARANCES ARE WAIVED.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Douglas J Roger, MD, Inc., A

Represented By  
Summer M Shaw  
Michael S Kogan  
George Hanover

**Movant(s):**

Arturo Cisneros (TR)

Represented By  
Chad V Haes  
D Edward Hays

**Trustee(s):**

Arturo Cisneros (TR)

Represented By

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

11:00 AM

**CONT...**

**Douglas J Roger, MD, Inc., A Professional Corporat and**

Chad V Haes

D Edward Hays

**Chapter 7**

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

11:00 AM

**6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat and**

**Chapter 7**

**#17.00** CONT Motion for Approval of Compromise Between Trustee and OIC Medical Corporation, Liberty Orthopedic Corporation, and Universal Orthopaedic Group

From: 5/11/16, 6/8/16, 6/29/16, 8/31/16, 10/5/16

Also #14 - #16

EH\_\_

Docket 318

**\*\*\* VACATED \*\*\* REASON: CONTINUED TO 2/1/17 AT 11:00 A.M.**

**Tentative Ruling:**

05/11/2016

Based on the representations made to the Court by counsel for the Parties that negotiations are ongoing, and based on the consent of the Parties to a continuance, the Court shall CONTINUE the hearing on the Motion to June 8, 2016 at 11:00 a.m.

APPEARANCES ARE WAIVED.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Douglas J Roger, MD, Inc., A

Represented By  
Summer M Shaw  
Michael S Kogan  
George Hanover

**Movant(s):**

Arturo Cisneros (TR)

Represented By  
Chad V Haes  
D Edward Hays

**Trustee(s):**

Arturo Cisneros (TR)

Represented By

**United States Bankruptcy Court  
Central District of California  
Riverside  
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**CONT...**

**Douglas J Roger, MD, Inc., A Professional Corporat and**

Chad V Haes

D Edward Hays

**Chapter 7**

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

2:00 PM

**6:16-13644 Yolanda Yvette Tyes**

**Chapter 7**

Adv#: 6:16-01200 Chicago Title Insurance Company v. Tyes

**#18.00** Motion to set aside Re: Entry of Default Pursuant to Fed.R.Civ P55(c)

Also #19 & #20

EH\_\_

Docket 15

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Yolanda Yvette Tyes	Pro Se
---------------------	--------

**Defendant(s):**

Yolanda Yvette Tyes	Pro Se
---------------------	--------

**Movant(s):**

Yolanda Yvette Tyes	Pro Se
---------------------	--------

**Plaintiff(s):**

Chicago Title Insurance Company	Represented By Charles C H Wu Thanh-Thuy T Luong Vikram M Reddy
---------------------------------	--

**Trustee(s):**

Larry D Simons (TR)	Pro Se
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**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

2:00 PM

**6:16-13644 Yolanda Yvette Tyes**

**Chapter 7**

Adv#: 6:16-01200 Chicago Title Insurance Company v. Tyes

**#19.00** CONT Motion for Default Judgment Under LBR 7055-1

From: 10/19/16

Also #18 & #20

EH\_\_

Docket 10

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Yolanda Yvette Tyes

Pro Se

**Defendant(s):**

Yolanda Yvette Tyes

Pro Se

**Movant(s):**

Chicago Title Insurance Company

Represented By  
Charles C H Wu  
Thanh-Thuy T Luong  
Vikram M Reddy

**Plaintiff(s):**

Chicago Title Insurance Company

Represented By  
Charles C H Wu  
Thanh-Thuy T Luong  
Vikram M Reddy

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

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**CONT... Yolanda Yvette Tyes**

**Chapter 7**

**Trustee(s):**

Larry D Simons (TR)

Pro Se

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

2:00 PM

**6:16-13644 Yolanda Yvette Tyes**

**Chapter 7**

Adv#: 6:16-01200 Chicago Title Insurance Company v. Tyes

**#20.00** CONT Status Conference Re: Complaint by Chicago Title Insurance Company against Yolanda Yvette Tyes. (d),(e), 62 - Dischargeability - 523(a)(2), false pretenses, false representation, actual fraud

From: 10/19/16

Also #18 & #19

EH\_\_

Docket 1

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Yolanda Yvette Tyes	Pro Se
---------------------	--------

**Defendant(s):**

Yolanda Yvette Tyes	Pro Se
---------------------	--------

**Plaintiff(s):**

Chicago Title Insurance Company	Represented By Charles C H Wu Thanh-Thuy T Luong Vikram M Reddy
---------------------------------	--

**Trustee(s):**

Larry D Simons (TR)	Pro Se
---------------------	--------

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

**Hearing Room 303**

2:00 PM

**6:16-13311 Jose Antonio Hernandez**

**Chapter 7**

Adv#: 6:16-01176 Simons v. Navarro

**#21.00** CONT Status Conference RE: Complaint to Avoid and Recover Fraudulent Transfer

From: 9/7/16

EH\_\_

Docket 1

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Jose Antonio Hernandez

Represented By  
Jessica De Anda Leon

**Defendant(s):**

Carolina Villalobos Navarro

Represented By  
Christopher J Langley

**Plaintiff(s):**

Larry D Simons

Represented By  
Frank X Ruggier

**Trustee(s):**

Larry D Simons (TR)

Represented By  
Frank X Ruggier

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
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**Hearing Room 303**

2:00 PM

**6:13-30477 Master Design Inc**

**Chapter 7**

**#22.00** CONT Motion to Compel Turnover of Recorded Information Relating to the Debtor's Assets and Financial Affairs Pursuant to 11 U.S.C. § 542(e) and Request for Attorney's Fees Pursuant to 11 U.S.C. § 105(a)

From: 6/29/16, 7/20/16, 8/31/16, 9/28/16

EH\_\_

Docket 77

**Tentative Ruling:**

**11/09**

**BACKGROUND**

On December 27, 2013, Master Design Inc. ("Debtor") filed a Chapter 7 voluntary petition.

On June 8, 2016, Steven Speier ("Trustee") filed a Notice of Motion and Motion to Compel Turnover of Recorded Information Relating to the Debtor's Assets and Financial Affairs Pursuant to 11 U.S.C. § 542(e) and Request for Attorney's Fees Pursuant to 11 U.S.C. § 105(a) ("Motion").

On June 15, 2016, Ardent Law Group, P.C. ("Ardent"), LKP Global Law, LLP ("LKP"), and Chen & Fan Accountancy Corporation ("Chen & Fan") (collectively, "Respondents") filed an opposition to the Motion. On June 22, 2016, the Trustee filed a reply.

A prior hearing on the Motion was held on August 31, 2016, at which the Court indicated that based on the pleadings submitted, the Court was inclined to order turnover, in part, based on its finding that an implied-in-fact attorney-client relationship existed between LKP and Debtor. The Court further indicated that it was disinclined to find it appropriate to award fees to the Trustee under § 105(a) for bringing the Motion. At the hearing, counsel for Ardent indicated that they had strong opposition to turnover of documents protected by the attorney-client privilege as to certain officers/directors of Debtor, which were represented by Ardent postpetition in connection with the related litigation brought by the Trustee against Debtor's former

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**Chapter 7**

officers. Ardent has provided a privilege log which asserts that various documents are entitled to attorney-client privilege, or are privileged based on the work product doctrine.

**STANDARDS**

Fed. R. Evid. 501 states: "[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." "Accordingly, federal common law governs whether the information sought . . . is protected by the attorney-client privilege." *Tornay v. U.S.*, 840 F.2d 1424, 1426 (9<sup>th</sup> Cir. 1988). The documents that Ardent has asserted are privileged fall into two categories: (1) billing invoices and (2) emails.

*1. Attorney-Client Privilege*

"The attorney-client privilege 'is the oldest of the privileges for confidential communications known to the common law.'" *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011) (*quoting Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). "Its aim is to 'encourage full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and administration of justice.'" *Id.* The attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. U.S.*, 425 U.S. 391, 403 (1976). "The burden of proof is on the party seeking to establish that the privilege applies. *U.S. v. Blackman*, 72 F.3d 1418, 1423 (9<sup>th</sup> Cir. 1995). In general, blanket assertions of the attorney-client privilege are disfavored. *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9<sup>th</sup> Cir.1992). "[B]ecause, like any other testimonial privilege, this rule contravene[s] the fundamental principle that the public has a right to every man's evidence," it is construed narrowly to serve its purposes. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1126 (9<sup>th</sup> Cir. 2012).

"[T]he attorney client privilege attaches to corporations as well as to individuals." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). In *Upjohn*, it was considered "whether privilege covers only communications between counsel and top management" and it was decided that "under certain

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**Chapter 7**

circumstances, communications between counsel and lower-level employees are also covered." *Id.* In *Upjohn*, the court found the communications to be privileged when they "concerned matters within the scope of the employees' corporate duties, and the employees were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."

"The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. U.S.*, 449 U.S. 383, 390 (1981). "The privilege ordinarily extends also to the attorney's response to the client's request for legal advice because such response usually effectively reveals the substance of the client's confidential communication to the attorney." *In re F.A. Potts & Co., Inc.*, 30 B.R. 708, 710 (Bankr. E.D. Pa. 1983) (Judge Twardowski) (citing *Matter of Fischel*, 557 F.2d 209, 211 (9<sup>th</sup> Cir. 1977)).

Ultimately, the required analysis regarding attorney-client privilege is the following:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3<sup>rd</sup> Cir. 1979) (quoting *U.S. v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)).

**2. Work-Product Doctrine**

On the other hand, "the work-product doctrine shelters the mental processes of the attorney, providing a privilege area within which he can analyze and prepare his client's case." *U.S. v. Nobles*, 422 U.S. 225, 238 (1975). "The work product doctrine establishes a qualified immunity, rather than a privilege, and the qualification of the immunity is to be determined upon a showing of necessity or good cause." *Verizon Cal. Inc. v. Ronald A. Katz Tech. Licensing, L.P.*, 266 F. Supp. 2d. 1144, 1147 (C.D.

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**Chapter 7**

Cal. 2003). "The conditional protections afforded by the work-product rule prevent exploitation of a party's efforts in preparing for litigation." *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1494 (9<sup>th</sup> Cir. 1989). "In order to qualify for protection under the work product doctrine, [t]he material in question must: (1) be a document or tangible thing, (2) which is prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for its representative." *Amica Mut. Ins. Co. v. W.C. Bradley Co.*, 217 F.R.D. 79, 83 (D. Mass. 2003). E-mails are considered a document or tangible thing under the first factor, and, therefore, that factor is not in dispute. *See e.g., Informatica Corp. v. Bus. Objects Data Integration, Inc.*, 454 F. Supp. 2d. 957, 963 (N.D. Cal. 2006).

Regarding the second factor, the Court must determine whether the document at issue was prepared "because of" actual or anticipated litigation. *See, e.g., U.S. v. Adlman*, 134 F.3d 1194 (2<sup>nd</sup> Cir. 1998). The standard "considers the totality of the circumstances and affords protection when it can fairly be said that the 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation.'" *In re Grand Jury Subpoena*, 357 F.3d 90, 908 (9<sup>th</sup> Cir. 2003) (*quoting Adlman*, 134 F.3d at 1195); *see also Visa U.S.A., Inc. v. First Data Corp.*, 2004 WL 1878209 (N.D. Cal. 2004).

Finally, the Court can readily determine whether any specific document was prepared "by or for a party, or by or for its representative."

*III. § 542(e) and the Client*

The attorney-client privilege and the work-product doctrine operate differently in the context of bankruptcy. The Supreme Court has stated: "[W]e conclude that vesting in the trustee control of the corporation's attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353 (1985). The Supreme Court reasoned as follows:

In light of the Code's allocation of responsibilities, it is clear that the trustee plays the role most closely analogous to that of a solvent corporation's management. Given that the debtor's directors retain virtually no management powers, they should not exercise the traditional management function of controlling the corporation's attorney-client privilege, unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws.

*Id. Weintraub*, however, dealt with prepetition communications. *See id.* ("[W]e hold that the trustee of a corporation in bankruptcy has the power to waive the

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**Chapter 7**

corporation's attorney-client privilege with respect to prebankruptcy communications.").

Regarding, post-bankruptcy communication, the following has been stated: "[A]ccording to the analysis required by *Weintraub*, the Trustee in this case, as the trustee for the bankruptcy estate, succeeded to the DIP's power to assert or waive the attorney-client privilege with respect to matters involving the administration of the estate." *In re Bame*, 251 B.R. 367, 374 (Bankr. D. Minn. 2000) (Judge Dreher). The reasoning in *Bame* is compelling and has previously been adopted in this district. *See In re Klein*, 2013 WL 6253819 at \*13 (Bankr. C.D. Cal. 2013) (Judge Neiter); *see also In re O.P.M. Leasing Servs., Inc.*, 13 B.R. 64, 67 (S.D.N.Y. 1981). Not only is the trustee the holder of the attorney client privilege, but the trustee is the holder of privilege arising from the work product doctrine. *See In re Am. Metrocomm Corp.*, 274 B.R. 641, 653-55 (Bankr. D. Del. 2002) (Judge Walsh). Therefore, to the extent that any privilege is being asserted on behalf of Master Design it can be waived, and effectively has been waived or has not been properly asserted. Therefore, privilege is only applicable if asserted on behalf of another party. Yet, the majority of the documents provided cannot be covered by a privilege held by a third-party, because they solely concern the bankruptcy of Master Design. Therefore, to the extent the documents are related to representation of Master Design, no privilege has been properly asserted.

**DOCUMENTS**

Arden has turned over six volumes of documents and a privilege log corresponding to Volume 2 and part of Volume 6. The Court will interpret the absence of any assertion of privilege regarding the remainder of the documents as consent to a finding that no privilege applies.

*Volume 2*

Arden has asserted privilege to the majority of Volume 2, specifically seventy-four e-mail chains that involve members of the firm. Some of the e-mails relate to representation of Master Design in its bankruptcy proceeding, however, and, for the reasons above, the Court finds privilege is inapplicable to those e-mails. The Court has reviewed the entirety of the e-mails and finds that privilege is applicable to documents #1-5, 7, 9-24, 26, 28-29, 32-34, 36-41, 47-48, and 50-51.

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**Master Design Inc**

**Chapter 7**

For the other 36 e-mails, the Court finds that privilege is wholly inapplicable because the subject of the e-mail is the representation of Master Design, rather than the representation of a party by whom privilege may have been asserted.

*Volume 6*

Volume 6 includes billing invoices directed to Master Design between January 2014 and June 2016.

The Ninth Circuit has repeatedly said that fee information generally is not privileged. *See, e.g., id.* ("We have said repeatedly, as the Tornays concede, that fee information generally is not privileged."). Classification of fee information as privileged does not further the end of fostering frank communication between attorney and client. *See id.* at 1428 ("We do not believe that clients, knowing that their attorney may be compelled to testify about the amount, date, and form of fees paid, would be inhibited from disclosing fully information needed for effective legal representation.").

In the Ninth Circuit, there is an exception when "because of exceptional circumstances, disclosure of the client's identity or the existence of a fee arrangement would reveal information that is tantamount to a confidential professional communication." *Id.* at 1428. This exception is narrow. *See generally id.* ("Some prospective clients, arguably, may decide not to retain counsel for legal services if they could be implicated by expenditures for those services. This is not, however, a sufficient justification to invoke the privilege.").

Here, however, the billing invoices of Ardent include a brief description of the work done. "[B]ills, ledgers, statements, time records and the like which also reveal the nature of the services provided, such as researching particular areas of law, also should fall within the privilege." *In re Grand Jury Witness*, 695 F.2d 359 (9<sup>th</sup> Cir. 1982). The first billing invoices, dated 1/28/14, 3/4/14, and 4/4/14 solely relate to representation of Master Design, and, therefore, privilege is not applicable to those documents. The court finds that the remaining billing invoices are privileged in accordance with the Ninth Circuit's decision above.

**TENTATIVE RULING**

**United States Bankruptcy Court  
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**CONT... Master Design Inc**

**Chapter 7**

The Court is inclined to find that privilege applies to documents #1-5, 7, 9-24, 26, 28-29, 32-34, 36-41, 47-48, and 50-51, as well as all billing invoices dated 5/8/14 or later. The remainder of the documents produced for in camera review will be turned over to the trustee.

APPEARANCES REQUIRED.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Master Design Inc

Represented By  
Eric M Sasahara  
John Y Kim

**Movant(s):**

Steven M Speier (TR)

Represented By  
Robert P Goe  
Marc C Forsythe  
Donald Reid

**Trustee(s):**

Steven M Speier (TR)

Represented By  
Robert P Goe  
Marc C Forsythe  
Donald Reid

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
Courtroom 303 Calendar**

**Wednesday, November 09, 2016**

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**6:13-30477 Master Design Inc**

**Chapter 7**

Adv#: 6:15-01370 Speier v. Test-Rite Products Corp. et al

**#23.00** CONT Status Conference Re: Complaint by Steven M Speier against Test-Rite Products Corp., Test-Rite International (U.S) Co. Ltd., Test-Rite International Co. Ltd., Judy Lee, Chester Lee, Christina Ma. (Charge To Estate). Complaint for: (1) Fraudulent Transfer Pursuant to 11 U.S.C. § 544(b) and Cal. Civ. Code § 3439.04(a)(1) and Recovery of Avoided Transfers Pursuant to 11 U.S.C. § 550; (2) Fraudulent Transfer Pursuant to 11 U.S.C. § 548(a)(1)(A) and Recovery of Avoided Transfers Pursuant to 11 U.S.C. § 550; (3) Fraudulent Transfer Pursuant to 11 U.S.C. § 544(b) and Cal. Civ. Code §§ 3439.04(a)(2), 3439.05 and Recovery of Avoided Transfers Pursuant to 11 U.S.C. § 550; (4) Fraudulent Transfer Pursuant to 11 U.S.C. § 548(a)(1)(B) and Recovery of Avoided Transfers Pursuant to 11 U.S.C. § 550; (5) Conversion; (6) Unlawful Payment of Dividends; (7) Breach of Fiduciary Duty by Officer; (8) Breach of Fiduciary Duty by Controlling Shareholder; and (9) Declaratory Relief as to Alter Ego Nature of Suit: (13 (Recovery of money/property - 548 fraudulent transfer)), (14 (Recovery of money/property - other))

From: 3/2/16, 4/6/16, 4/27/16, 6/29/16, 7/20/16, 8/3/16, 9/28/16

EH\_\_

Docket 1

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Master Design Inc

Represented By  
Eric M Sasahara  
John Y Kim

**Defendant(s):**

Christina Ma

Represented By  
Julie A Garcia

**United States Bankruptcy Court  
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Riverside  
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**Master Design Inc**

**Chapter 7**

Joon M Khang  
Aaron B Craig

Test-Rite International (US) Co. Ltd.

Represented By  
Joon M Khang  
Julie A Garcia  
John Y Kim  
Aaron B Craig

Test-Rite Products Corp.

Represented By  
Joon M Khang  
Julie A Garcia  
John Y Kim  
Aaron B Craig

Chester Lee

Represented By  
Julie A Garcia  
Joon M Khang  
Aaron B Craig

Test-Rite Products Corp.

Represented By  
Julie A Garcia  
John Y Kim  
Aaron B Craig

Test-Rite International (U.S) Co.

Represented By  
Julie A Garcia  
John Y Kim  
Aaron B Craig

Test-Rite International Co. Ltd.

Represented By  
Julie A Garcia  
Aaron B Craig  
Joon M Khang  
John Y Kim

**Plaintiff(s):**

Steven M Speier

Represented By  
Robert P Goe

**United States Bankruptcy Court  
Central District of California  
Riverside  
Judge Mark Houle, Presiding  
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**CONT... Master Design Inc**

**Chapter 7**

Marc C Forsythe

**Trustee(s):**

Steven M Speier (TR)

Represented By  
Robert P Goe  
Marc C Forsythe  
Donald Reid

**United States Bankruptcy Court  
Central District of California  
Riverside  
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**6:10-14843 Benjie Lee Soliz and Judy Lynn Soliz**

**Chapter 7**

**#24.00** CONT Chapter 7 Trustees Motion for Order (1) Approving Compromise of West Virginia District Court Action, (2) Authorizing Employment of Blasingame, Burch, Garrard and Ashley, PC as Special Counsel and Payment of Compensation to Special Counsel; and (3) Granting Related Relief Including Disbursements From the Settlement Payment

From: 8/31/16, 10/5/16

EH\_\_

Docket 39

**Tentative Ruling:**

**11/9/2016**

**BACKGROUND:**

On February 22, 2010, Benjie and Judy Soliz (together "Debtors") filed a voluntary chapter 7 petition for relief. Robert Goodrich was originally appointed as the chapter 7 trustee. On June 14, 2010, Debtors received their discharge and their case was closed on June 22, 2010.

On May 4, 2015, the United States Trustee ("UST") filed a Motion to Reopen Debtors' case, which was granted by the Court by order entered on May 5, 2015. UST sought to reopen Debtors' case because it was contacted by Debtors' litigation counsel, Blasingame, Burch, Garrard and Ashley, PC ("Special Counsel"), that Ms. Soliz became aware in 2011 that she may hold personal injury claims against medical manufacturers based on pre-petition events. Debtors had filed two lawsuits seeking damages for personal injuries as well as past and future medical expenses. UST was informed that the Debtors may be entitled to a settlement award in one of the actions ("Action #1") and sought to reopen the case so that the Court may determine whether the estate in the product liability litigation and any settlement awards.

After the case was reopened, Karl Anderson was appointed and is the duly

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**CONT...      Benjie Lee Soliz and Judy Lynn Soliz**

**Chapter 7**

acting chapter 7 trustee ("Trustee"). On June 10, 2015, Debtors filed amended Schedules B and C. Debtors' amended schedules reflected that the claims with respect to the second action ("Action #2") are not property of the estate because the act giving rise to the potential liability occurred post-petition. Debtors exempted the settlement amounts from Action #1. Trustee investigated the claims listed in Debtors' amended schedules and determined that the full amount of the settlement proceeds from Action #1 were exempt. Trustee filed a report of no distribution and Debtors' case was closed on August 27, 2015.

On February 1, 2016, UST filed a second Motion to Reopen Debtors' case, which was granted by the Court by order entered on February 3, 2016. In late October 2015, Trustee was informed that Debtors received a proposed settlement offer in Action #2 of approximately \$110,000, and that this action covered product liability claims that arose pre-petition. Trustee filed a notice of assets on February 11, 2016, and on May 27, 2016, the Court entered an order approving the employment of Shulman Hodges & Bastian LLP ("Counsel") as general counsel for Trustee retroactive to October 29, 2015.

On August 4, 2016, Trustee filed a Notice of Motion and Motion for Order: (1) Approving Compromise of West Virginia District Court Action; (2) Authorizing the Employment of Blasingame, Burch, Garrad and Ashley, PC as special counsel and payment of compensation to special counsel; and (3) Granting Related Relief Including Approval of Disbursements from the Settlement Payment ("Motion").

On October 10, 2016, the Trustee filed a Notice of Supplement and Supplement to the Motion ("Supplement"). Specifically, the Trustee indicated that he had received a limited objection by the Debtors based on their assertion of entitlement to an exemption in proceeds from the settlement of the West Virginia District Court Action. The Supplement indicates that the Trustee and Debtors have reached an agreement as to the proceeds which will result in a partial payment from the gross award to the Debtors.

As of November 7, 2016, there has been no response to the Motion.

**DISCUSSION**

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**Benjie Lee Soliz and Judy Lynn Soliz**

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**SETTLEMENT AGREEMENT**

Debtors' settlement ("Settlement") of Action #2 in the amount of \$110,000 provides for \$68,746.94 to the estate. Of the \$68,746.94, Trustee proposes to pay \$39,600 for Special Counsel's fees and \$4,146.94 for Special Counsel's expenses, leaving \$25,000 in net proceeds.

Trustee requests that the Court approve the Settlement under Rule 9019(a). Rule 9019(a) authorizes the bankruptcy court to approve a compromise or settlement on the trustee's motion and after notice and a hearing. FRBP 9019. The bankruptcy court must consider all "factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). In other words, the bankruptcy court must find that the settlement is "fair and equitable" in order to approve it. *In re A & C Properties*, 784 F.2d 1377, 1380 (9th Cir. 1986).

In conducting this inquiry, bankruptcy courts must consider the following factors:

(a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

*Id.*

Bankruptcy courts enjoys broad discretion in approving a compromise because they are "uniquely situated to consider the equities and reasonableness [of it]...." *United States v. Alaska Nat'l Bank (In re Walsh Construction, Inc.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). As stated in *A & C Props.*:

The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims. The law favors compromise and not litigation for its own sake, and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed.

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*Id.* (citations omitted).

The trustee bears the burden of proving to the bankruptcy court that the settlement is fair and equitable and should be approved. *In re A & C Properties*, 784 F.2d at 1382. Here, the Court finds that the applicable A&C factors weigh in favor of finding that the Settlement is fair and equitable.

**SPECIAL COUNSEL**

Trustee requests approval to employ Special Counsel with compensation under § 328 and to pay Special Counsel a contingency fee of 40% less a 4% common benefit expense, plus reimbursement of expenses in the amount of \$4,146.94 (total amount \$43,746.94).

Here the Court notes that Special Counsel has represented the Debtors as of 2011, and arguably the estate as of 2011. Thus, it appears that Special Counsel must be employed *nunc pro tunc*. However, this is not requested in the Motion or set forth in the notice of the Motion.

Bankruptcy courts possess equitable power to retroactively approve a professional's valuable but unauthorized services. *See Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.)*, 40 F.3d 1059, 1062 (9th Cir. 1994); *Okamoto v. THC Fin. Corp. (In re THC Fin. Corp.)*, 837 F.2d 389, 392 (9th Cir. 1988). *Nunc pro tunc* employment approval is granted only in extraordinary or exceptional circumstances. *In re Mehdipour*, 202 B.R. 474, 479 (9th Cir. B.A.P. 1996). *Nunc pro tunc* approval is usually not granted where the failure to obtain prior court approval was due to mere negligence. *See In re B.E.S. Concrete Products*, 93 B.R. 228, 231 (Bankr. E.D. Cal. 1998). In order to grant *nunc pro tunc* employment, professionals must (1) satisfactorily explain the failure to receive prior employment approval and (2) demonstrate that the services rendered benefitted the estate in a significant manner. *Atkins v. Wain (In re Atkins)*, 69 F.3d 970, 975-76 (9th Cir. 1995).

While, there is evidence that Special Counsel's services provided a benefit for the estate, Trustee has not provided any explanation why he failed to employ Special Counsel earlier. Trustee was aware of Special Counsel's representation of the estate's interest in Action #2 on or around October 2015, but waited almost 10 months before

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filing the instant employment application in connection with the 9019 Motion.

The Motion also proposes to pay Special Counsel who will then disburse the total compensation paid by the estate as follows: (1) 50% to Special Counsel, (2) 30% to Burke, Harvey & Frankowski, LLC, and (3) 20% to Steigerwalt and Associates and its successor Ford & Associates Nationwide Legal Services [Motion page 10, line 27 to page 11, line 3]. It is unclear why Special Counsel is proposing to disburse its fees received from the estate to these other entities. Moreover, Trustee has not established that these other entities are disinterested, or provided the Court with any explanation or disclosure of any fee sharing agreement between Special Counsel and these other entities. And to the extent those other entities represented the Debtor's estate, it is unclear why they were not employed.

**OTHER DISBURSEMENTS**

Trustee requests approval to pay the 5% common benefit expense required by the District Court (4% of which is being paid by Special Counsel), pay subrogation liens to the lien administrator appointed by the District Court in the amount of \$3,809.35, and disburse net proceeds in the amount of \$31,943.71 to the Debtors (Debtor's injuries relate to three separate incidents, two that took place pre-petition, and one that took place post-petition). Once, and if the Settlement is approved, the Court is inclined to approve Trustee's request for the additional disbursements as set forth above.

**Tentative Ruling:**

Based on the foregoing, the Court is inclined to CONTINUE the hearing on the Motion to allow Trustee to supplement the Motion and address the following issues:

1. Employment of Special Counsel *nunc pro tunc*, and
2. Disbursement of Special Counsel's fees to other entities.

**APPEARANCES REQUIRED.**

<b>Party Information</b>
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**CONT... Benjie Lee Soliz and Judy Lynn Soliz**

**Chapter 7**

**Debtor(s):**

Benjie Lee Soliz

Represented By  
Joseph L Borrie

**Joint Debtor(s):**

Judy Lynn Soliz

Represented By  
Joseph L Borrie

**Movant(s):**

Karl T Anderson (TR)

Represented By  
Leonard M Shulman  
Melissa Davis Lowe

**Trustee(s):**

Karl T Anderson (TR)

Represented By  
Leonard M Shulman  
Melissa Davis Lowe

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**6:13-30133 Nabeel Slaieh**

**Chapter 7**

Adv#: 6:16-01224 Simons (TR) v. Slaieh et al

**#25.00** Motion to Dismiss Adversary Proceeding

EH\_\_

Docket 7

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Nabeel Slaieh

Represented By  
George A Saba

**Defendant(s):**

Joanne Fraleigh

Represented By  
George A Saba

Nabeel Naiem Slaieh

Represented By  
George A Saba

**Movant(s):**

Joanne Fraleigh

Represented By  
George A Saba

**Plaintiff(s):**

Larry D. Simons (TR)

Represented By  
David Wood  
Matthew Grimshaw

**Trustee(s):**

Larry D Simons (TR)

Represented By  
D Edward Hays  
David Wood

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**CONT...**

**Nabeel Slaieh**

Matthew Grimshaw

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**6:13-30133 Nabeel Slaieh**

**Chapter 7**

Adv#: 6:16-01147 Slaieh v. Simons

**#25.10** CONT Status Conference RE: [1] Adversary case 6:16-ap-01147. Complaint by Nabeel Slaieh against Larry D Simons (71 (Injunctive relief - reinstatement of stay)

**Holding Date**

From: 8/31/16, 9/21/16, 10/5/16, 11/2/16

EH\_\_

Docket 1

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Nabeel Slaieh

Represented By  
George A Saba

**Defendant(s):**

Larry D Simons

Represented By  
Matthew Grimshaw

**Plaintiff(s):**

Nabeel Slaieh

Represented By  
Bruce A Boice

**Trustee(s):**

Larry D Simons (TR)

Represented By  
D Edward Hays  
David Wood  
Matthew Grimshaw

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**6:13-27611 Douglas Jay Roger**

**Chapter 7**

Adv#: 6:16-01199 Revere Financial Corporation v. Bank of Southern California, N.A.

**#26.00** Motion to Dismiss First Amended Complaint

Also #27

EH\_\_

Docket 18

**\*\*\* VACATED \*\*\* REASON: CONTINUED TO 11/30/16 AT 2:00 P.M.**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Douglas Jay Roger

Represented By  
Summer M Shaw

**Defendant(s):**

Bank of Southern California, N.A.

Represented By  
Kathryn M.S. Catherwood

**Movant(s):**

Bank of Southern California, N.A.

Represented By  
Kathryn M.S. Catherwood  
Kathryn M.S. Catherwood  
Kathryn M.S. Catherwood  
Kathryn M.S. Catherwood

**Plaintiff(s):**

Revere Financial Corporation

Represented By  
Franklin R Fraley Jr

**Trustee(s):**

Helen R. Frazer (TR)

Represented By

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**CONT...**

**Douglas Jay Roger**

**Chapter 7**

Laurel R Zaeske  
Arjun Sivakumar  
Carmela Pagay  
Franklin R Fraley Jr

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**6:13-27611 Douglas Jay Roger**

**Chapter 7**

Adv#: 6:16-01199 Revere Financial Corporation v. Bank of Southern California, N.A.

**#27.00** CONT Status Conference Re: Complaint by Revere Financial Corporation against Bank of Southern California, NA 12 - Recovery of money/property - 547 preference, 14 - Recovery of money/property - other

From: 10/19/16

Also #26

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Docket 1

**\*\*\* VACATED \*\*\* REASON: CONTINUED TO 11/30/16 AT 2:00 P.M.**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Douglas Jay Roger

Represented By  
Summer M Shaw

**Defendant(s):**

Bank of Southern California, N.A.

Represented By  
Kathryn M.S. Catherwood

**Plaintiff(s):**

Revere Financial Corporation

Represented By  
Franklin R Fraley Jr

**Trustee(s):**

Helen R. Frazer (TR)

Represented By  
Laurel R Zaeske  
Arjun Sivakumar  
Carmela Pagay

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**CONT...**

**Douglas Jay Roger**

Franklin R Fraley Jr

**Chapter 7**

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**6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat**

**Chapter 7**

Adv#: 6:15-01304 Cisneros v. Kajan Mather & Barish, a professional corporation

**#28.00** Motion of Mather Kuwada, Mather Law Corporation, Law Offices of Kenneth M. Barish, Steven R. Mather, and Kenneth M. Barish for Summary Judgment Or, In The Alternative, Summary Adjudication of the Issues

Also #29 & #30

EH\_\_

Docket 90

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Douglas J Roger, MD, Inc., A

Represented By  
Summer M Shaw  
Michael S Kogan  
George Hanover

**Defendant(s):**

LAW OFFICE OF KENNETH M.

Pro Se

Steven R. Mather

Pro Se

Kenneth M. Barish

Pro Se

Kajan Mather & Barish, a

Represented By  
Michael S Kogan

MATHER KUWADA, a limited

Represented By  
Michael S Kogan

MATHER LAW CORPORATION,

Represented By  
Michael S Kogan

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**CONT... Douglas J Roger, MD, Inc., A Professional Corporat**

**Chapter 7**

**Movant(s):**

Kajan Mather & Barish, a

Represented By  
Michael S Kogan

**Plaintiff(s):**

A. Cisneros

Represented By  
D Edward Hays  
Chad V Haes  
Franklin R Fraley Jr  
Sue-Ann L Tran  
Jasmine W Wetherell

**Trustee(s):**

Arturo Cisneros (TR)

Represented By  
Chad V Haes  
D Edward Hays

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**6:13-27344 Douglas J Roger, MD, Inc., A Professional Corporat**

**Chapter 7**

Adv#: 6:15-01304 Cisneros v. Kajan Mather & Barish, a professional corporation

**#29.00** CONT Motion of Kajan Mather & Barish for Summary Judgment Or, In The Alternative, Summary Adjudication of the Issues

From: 11/2/16

Also #28 & #30

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Docket 77

**Tentative Ruling:**

**11/09/2016**

**BACKGROUND**

On October 20, 2013, Douglas J. Roger, MD Inc., a Professional Corporation ("Debtor") filed a petition for Chapter 7 relief. On October 20, 2015, Arturo Cisneros ("Trustee") filed a complaint against Kajan Mather & Barish ("Defendant"); Mather Kuwada, a limited liability partnership; Mathew Law Corporation, a California corporation; Law Office of Kenneth M. Barish; Steven R. Mather; and Kenneth M. Barish alleging preferential and fraudulent transfers. On November 18, 2015, Defendant filed an Answer. On February 25, 2016, certain defendants filed a motion for summary judgment. Defendant did not join in that motion. The Others' The priorsummary judgment motion has been continued multiple times and is currently scheduled to be heard on November 9, 2016.

On September 13, 2016, Defendant filed its motion for summary judgment or, in the alternative, summary adjudication of the issues. On October 12, 2016, Trustee filed his opposition to the motion for summary judgment. On October 19, 2016, Defendant filed its reply.

The primary parties involved in this dispute are Defendant, Debtor, and Douglas J. Roger, individually ("Roger"). The Trustee alleges that KMB received

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transfers in the amount of \$115,424.36 from Debtor and that KMB did not provide value or reasonably equivalent to the Debtors. The Trustee argues that these payments are avoidable as intentional fraudulent transfers (Count 2) and/or constructive fraudulent transfers (Count 3). The Trustee further alleges that \$9,092.27 is alternatively avoidable as a preferential transfer (Count 1).

Defendant argues that Count 2 ("actual transfer") fails to state a claim because Trustee has not sufficiently alleged actual fraud. Defendant argues that summary judgment should be granted on Count 3 because Defendant provided reasonably equivalent value. While Count 1 is not explicitly addressed in the motion, Defendant argues, as a defense to all claims, that it was a subsequent transferee that took for value and in good faith.

Trustee responds by identifying a few badges of fraud and arguing that those badges are sufficient evidence on a motion for summary judgment with regard to Claim 2. Trustee argues that reasonably equivalent value was not received (at least to with respect to those services that decreased the income tax of Roger) because Debtor did not realize any benefit from a decrease in Roger's income tax liability. Finally, Trustee argues that Defendant is not a subsequent transferee because BWI Consulting, LLC ("BWI") had no dominion or control over the funds.

**STATEMENT OF FACTS**

Debtor became a client of Defendant in January 2010. Defendant was to represent Debtor in tax matters with the IRS. Debtor was billed periodically on an hourly basis. The invoices were directed to Roger, individually. The principle facts at issue in this motion concern the nature of the work done by Defendant for Debtor.

The primary matters that Defendant worked on were income tax appeals and United States Tax Court cases for 2002 through 2005. Debtor is an S corporation, and, as such, the corporation's income tax is paid at the individual level. At issue in this motion is whether, and in what circumstances, Roger was liable for the income taxes, and whether, and in what circumstances, Debtor was liable for the income taxes. Defendant additionally argues that a portion of the services provided were related to Debtor's employment taxes. Trustee concedes that Debtor was liable for the employment taxes. Presently, there does not appear to be any evidence indicating how much of the services were related to income tax and how much were related to employment tax.

Defendant additionally argues that "the corporation still retains a liability if the [income] taxes are not paid by the shareholder, the corporation would have additional liabilities." Trustee objects to this contention and has provided the declaration of

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Lydia Turanchik, Defendant's attorney who provided services, as support.

**Chapter 7**

**DISCUSSION**

**I. Summary Judgment Standard**

A court may grant summary judgment if the movant shows that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRBP 7056 (incorporating FRCP 56). "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. 242, at 249-50. "A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." 477 U.S. 242 at 248.

Defendant advances three primary arguments in support his motion for summary judgment: (1) the Trustee fails to state a claim for fraudulent transfer; (2) Defendant provided reasonably equivalent value; and (3) Defendant was a good faith transferee.

**II. Trustee Fails to State a Claim**

11 U.S.C. §548(a)(1)(A) provides:

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years<sup>1</sup> before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such

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transfer was made or such obligation was incurred, indebted;

11 U.S.C. § 548 (2005); *see also* Cal. Civ. Code § 3439.04 (2016) (equivalent state law provision). The relevant provision of the Uniform Voidable Transfers Act, adopted in California as Cal. Civ. Code § 3439.04 (2016), includes "badges of fraud" to guide in making a determination of "actual intent":

(b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:

- (1) Whether the transfer or obligation was to an insider.
- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor's assets.
- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
- (11) Whether the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

The badges of fraud analysis is applicable in the context of bankruptcy courts. *See e.g. Ritchie Capital Mgmt., LLC v. Stoebner*, 779 F.3d 857, 862-63 (8<sup>th</sup> Cir. 2015); *see also In re Llamas*, 2011 WL 7637254 at \*6 (Bankr. C.D. Cal. 2011) (Judge

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Carroll) (*quoting In re Beverly*, 374 B.R. 221, 236 (9<sup>th</sup> Cir. B.A.P. 2007)) ("The UFTA list of 'badges of fraud' provides neither a counting rule, nor a mathematical formula. No minimum number of factors tips the scales toward actual intent. A trier of fact is entitled to find actual intent based on the evidence in the case, even if no 'badges of fraud' are present. Conversely, specific evidence may negate an inference of fraud notwithstanding the presence of a number of 'badges of fraud'."). "The focus is on the intent of the transferor." *Beverly*, 374 B.R. 221, 235.

The Trustee identifies three badges of fraud that he argues exist in this case: (1) the payments were made while litigation was pending; (2) the payments were made shortly after Debtor incurred debt; and (3) Debtor did not receive reasonably equivalent value for the transfer.

"The presence of one or more [badges of fraud] does not create a presumption of fraud, but is merely evidence from which an inference of fraudulent intent may be drawn." *Wyzard v. Goller*, 23 Cal. App. 1183, 1190 (Cal. Ct. App. 1994). "Fraudulent intent is most commonly inferred 'when an insolvent debtor makes a transfer and gets nothing or very little in return.'" *In re Empire Land, LLC*, 2016 WL 1371278 at \*4 (Bankr. C.D. Cal. 2016) (Judge Houle) (*citing Kupetz v. Wolf*, 845 F.2d 842, 946 (9<sup>th</sup> Cir. 1988)). Again, on a motion for summary judgment, "summary judgment . . . would be appropriate only if the evidence, viewed in a light most favorable to the non-moving party, presents [no] genuine issues of material fact." *In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318, 339 (Bankr. N.D. Cal. 2009) (Judge Montali).

Summary judgment<sup>2</sup> on an actual fraud claim is unusual, because intent is a factual issue. *See, e.g., Golden Budha Corp. v. Canadian Land Co. of America, N.V.*, 931 F.2d 196, 201-202 (2<sup>nd</sup> Cir. 1991) ("Ordinarily, the issue of fraudulent intent cannot be resolved on a motion for summary judgment, being a factual question involving the parties' states of mind."). The moving party would have to demonstrate that there is no basis upon which a rational trier of fact could infer a fraudulent intent.

Defendant states that: "In this case, the Trustee has the burden to show fraudulent intent by a preponderance of the evidence." That is not the requirement at this stage of the litigation. Here, "once a trustee establishes indicia of fraud . . ., the burden shifts to the transferee to prove some 'legitimate supervening purpose' for the transfers at issue." *In re Acequia, Inc.*, 34 F.3d 800, 806 (9<sup>th</sup> Cir. 1994). "Indicia of fraud" include the badges of fraud listed above. Defendant has not proven any supervening purpose.

Given the detail provided by the Trustee, a rational trier of fact could infer actual intent to defraud from the badges of fraud identified. Specifically, a rational factfinder could infer that Debtor was in poor financial position and had significant

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liabilities and/or was about to incur significant liabilities, yet Roger diverted funds of Debtor for his own benefit, for which Debtor received nothing or inequivalent value in return, thereby depleting the amount available to, and hindering, creditors.

**III. Reasonably Equivalent Value**

11 U.S.C. § 548(a)(1)(B) (2005) provides the requirement for a constructively fraudulent transfer:

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation

The Fourth Circuit has stated the following:

Reasonably equivalent value is not susceptible to simple formulation. . . . The focus is on the consideration received by the debtor, not on the value given by the transferee. *The purpose of fraudulent transfer law is the preservation of the debtor's estate for the benefit of its unsecured creditors. Consequently, what constitutes reasonably equivalent value must be determined from the standpoint of the debtor's creditors.*

*In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 484 (4<sup>th</sup> Cir. 1992) (citing Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 Bankr. Dev. J. 55, 80 (1991); see also *In re Maddalena*, 176 B.R. 551, 555 (Bankr. C.D. Cal. 1995) (Judge Pappas) (same).

It does not appear to be contested that Defendant provided value to some entity. Instead, Trustee's contention is that reasonably equivalent value was not provided to *Debtor*. Defendant states that: "1) KMB orally contracted with the Debtor; and (2) BWI paid KMB for the services Debtor received from KMB." Defendant

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further states:

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KMB has submitted substantial evidence in its declarations in support of the Motion from which the Court must infer that the Debtor received reasonably equivalent value from KMB's services. KMB's services dealt with millions of dollars of liability of the Debtor, and KMB was successful in reducing this liability of the Debtor substantially.

Defendant seems to rely on two different arguments: (1) that Debtor directly decreased *Debtor's* tax liability; and (2) that Debtor indirectly benefitted from the services pursuant to the indirect benefit rule.

*A. Direct Tax Benefit*

Debtor is an S corporation, and, as such, its profit or losses passes through to the shareholders, who shoulder the corresponding tax burdens. *See generally* 26 U.S.C. § 1366 (2007); *see also In re 800Ideas.com, Inc.*, 496 B.R. 165, 171-72 (9<sup>th</sup> Cir. B.A.P. 2013) (Judge Jury). As Trustee notes, it is difficult to see how Debtor could have received a direct benefit from the reduction of the tax liability of Roger; the amount of Roger's tax liability does not affect the financial position of Debtor. *See In re Apex Auto. Warehouse, L.P.*, 238 B.R. 758, 773 (Bankr. N.D. Ill. 1999) (Judge Katz). There is no evidence in the record that suggests Debtor was liable for Roger's taxes; while Defendant's reply suggests the IRS "assessed" Debtor for income tax delinquency, the Exhibit referenced was not attached. As the Trustee seems to concede, to the extent Defendant's services were directed at reducing the employment tax of Debtor, for which Debtor was liable, reasonably equivalent value would appear to have been provided. There has been no attempt at distinguishing between services which reduced the income tax that passes through to Roger and the employment tax of Debtor. And Defendant has not provided any legal or factual evidence that Debtor was liable for any income tax that Roger did not satisfy.

Defendant also argues that "[e]ach time the Debtor made a payment on the open book account with KMB on the Invoices, the Debtor satisfied its own antecedent debt, which by definition constitutes 'value' for fraudulent transfer purposes under the Bankruptcy Code and California law." This argument is not compelling. The proper inquiry is whether the debt itself was incurred in connection with the receipt of reasonably equivalent value. If reasonably equivalent value was not received, then release from that debt cannot constitute reasonably equivalent value. And Defendant's discussion of the law regarding "book accounts" is also irrelevant; it does not affect the determination of whether reasonably equivalent value was received.

*B. Indirect Benefit Rule*

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As Defendant notes:

It is well settled that "reasonably equivalent value can come from one other than the recipient of the payments, a rule which has become known as the indirect benefit rule. If the consideration given to the third person otherwise has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved, and [the statute] has been satisfied-provided, of course, that the value of the benefit received by the debtor approximates the value of the property or obligation he has given up. If the debtor receives such reasonably equivalent value, "then the transaction has not significantly affected his estate and his creditors have no cause to complain."

*In re Flashcom, Inc.*, 503 B.R. 99, 117 (C.D. Cal. 2013).

Defendant relies on *Northlake Foods* for the proposition that an indirect benefit has been received by Debtor. *In re Northlake Foods, Inc.*, 715 F.3d 1251 (11<sup>th</sup> Cir. 2013). In *Northlake Foods*, the Eleventh Circuit determined that an S-corp election could constitute reasonably equivalent value to Debtor which would preclude avoidance of the tax reimbursements paid to the shareholders. *See id.* at 1256 ("The complaint clearly shows that the Shareholders Agreement provides Northlake with valuable benefits by virtue of its S-corporation election. We hold that these benefits constitute a reasonably equivalent exchange of value for the 2006 Transfer and therefore affirm."). Defendant does not address the crucial underlying point of the *Northlake* decision though: that the corporation was contractually obligated to make a payment to the shareholders equal to the tax liability. Therefore, any decrease in tax liability, in that situation, would correspond to a decrease in contractual liability of the corporation. Defendant provides no evidence of a similar agreement in this situation.

#### **IV. Tracing**

Defendant also argues that it is the Trustee's burden to trace the funds he seeks to recover. The cases Defendant cites do not stand for that proposition. In *In re Bridge* the court stated:

Although Agent Pickering's investigation was thorough and her testimony credible, the Court must reject the government's legal position that estate funds, once commingled, are "lost." . . . In this case, it is not fatal to the trustee's position that, dollar for dollar, the exact funds cannot be traced.

90 B.R. 839, 846-47 (Bankr. E.D. Mich. 1988) (Judge Rhodes). And, in this court, the ability to demonstrate that a defendant actually received funds is sufficient for tracing purposes. *See generally In re Tag Entm't Corp.*, 2016 WL 1239519 at \*16-18

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(Bankr. C.D. Cal. 2016) (Judge Kaufman). Here, there is no dispute that Defendant actually received the funds.

**V. Initial Transferee**

Defendant also argues that it was not the initial transferee of the funds. The parties agree on the standard: "Under the dominion test, a transferee is one who has dominion over the money or other asset, the right to put the money to one's own purposes. *In re Tag Entm't Corp.*, 2016 WL 1239519 at \*18 (Bankr. C.D. Cal. 2016) (Judge Kaufman) (*quoting In re Incomnet*, 463 F.3d 1064, 1070 (9<sup>th</sup> Cir. 2006)). The parties instead dispute whether BWI qualifies as an initial transferee. That dispute is irrelevant in this district with regard to fraudulent transfers. 11 U.S.C. § 550(b)(1) (1994) states that the Trustee cannot recover from a subsequent transferee when the subsequent transferee: "takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer voided." But 11 U.S.C. § 548(c) (2005) states that:

a transferee or obligee of such transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

*In re Maddalena* stated that: "the courts define the 'good faith' required by Section 548(c) to mean that viewed objectively, the transferee neither knew nor should have known of the fraudulent nature of the transfer." 176 B.R. 551, 555 (Bankr. C.D. Cal. 1995) (Judge Pappas) (*citing In re Agric. Research & Tech. Group*, 916 F.2d 528, 535 (9<sup>th</sup> Cir. 1990)). This is the same standard as is applied under § 550(b)(2), as shown in section VI., *infra*. Compare 5 Collier on Bankruptcy § 548.09[2] ("Section 548(c) thus requires both value and good faith") with § 548.09[2][c] ("A section § 550(b) transferee can be excepted from liability only if he or she is a good faith transferee, and only to the extent that value was given.")

Therefore, as to the § 548 claims, this distinction makes no difference. § 548(c) is not a defense to a § 547 claim though, while § 550(b) is a defense to a § 547 claim. Nevertheless, § 550(a)(1) (1994) states: "the initial transferee of such transfer or the entity for whose benefit such transfer was made." (emphasis added); *see also In re Incomnet, Inc.*, 463 F.3d 1064, 1074 (9<sup>th</sup> Cir. 2006). The record contains a declaration of a former consultant of BWI, Betty Tate-Sylvester, that states the funds

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were transferred to BWI to cover bills and invoices, that BWI had no legal right to the funds, and that Roger directed the payment of all funds from the account to creditors. Therefore, a rational factfinder could conclude that the funds at issue were transferred to BWI for the benefit of Defendant and that BWI had no dominion over the funds. *See, e.g., In re U.S. Mortg. Corp.*, 492 B.R. 784, 818 (Bankr. D.N.J. 2013) (initial transferee is a factual issue inappropriate for summary judgment when record is inadequate).

**VI. Good Faith Transferee**

11 U.S.C. § 550(b)(1) (1994) states:

(b) The trustee may not recover under section (a)(2) of this section from-

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided;

§550(a)(2) only applies to subsequent transferees. Therefore, this good faith defense does not apply because, as stated above, there remains a factual question as to whether Debtor was an initial transferee.

**VII. Evidentiary Objection**

Defendant appears to object to all of the exhibits included in the Trustee's evidence appendix with the following "shotgun" statement:

Each of these statements are inadmissible hearsay evidence inasmuch as no Declarant has established that these statements fall within an exception as provided in Federal Rules of Evidence Rule 803. In addition, Defendant fails to lay a proper foundation establishing personal knowledge of the events described by these statements. Nothing in the Exhibits demonstrates that Defendant acquired personal knowledge regarding the details and information contained in the documents he is trying to authenticate or the information he is stating. These are conclusory statements without any foundation, basis or justification for these assessments of the information. Defendant is also asserting what he believes another is asserting without personal knowledge of what actually occurred, and there is no testimony as to the accuracy of the documents that he says he has reviewed or not reviewed or what their contents are. The best source for this knowledge is not Defendant, but the document that is referred to. None of the documents submitted or are to be submitted are authenticated or contain any other basis for admission as evidence, or can form the

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basis for Defendant. . . .

By these statements, the Defendant offers his conclusions as to what the Exhibits did or did not contain. The Exhibits speak for themselves.

It is unclear exactly what relief Defendant requests. First, Defendant appears to mischaracterize the Trustee as the Defendant. Second, Defendant alternatively argues that the evidence is inadmissible and that the evidence speaks for itself. The Court, in its role as fact-finder, reviews and interprets the evidence. Defendant's arguments regarding admissibility are all without merit. All of the evidence submitted by Trustee falls into the following three categories: (1) court files and proceedings; (2) depositions; and (3) declarations signed under penalty of perjury. Regarding (1), as Defendant concedes, judicial notice is appropriate under Fed. R. Evid. 201. *See e.g., Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9<sup>th</sup> Cir. 2006) ("We may take judicial notice of court filings and other matters of public record."). Regarding (2), depositions are a standard form of evidence and can be used at hearings and trials in accordance with Fed. R. Civ. P. Rule 32. Finally, regarding (3), declarations signed under penalty of perjury are a common form of evidence in this district. Local Rule 9013-1(i)(3) states: "In lieu of oral testimony, a declaration under penalty of perjury will be received into evidence." Therefore, the Trustee's evidence is admissible.

**TENTATIVE RULING**

The Court is inclined to DENY the motion in its entirety.

APPEARANCES REQUIRED.

<b>Party Information</b>
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**Debtor(s):**

Douglas J Roger, MD, Inc., A

Represented By  
Summer M Shaw  
Michael S Kogan

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George Hanover**

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**Defendant(s):**

LAW OFFICE OF KENNETH M.	Pro Se
Steven R. Mather	Pro Se
Kenneth M. Barish	Pro Se
Kajan Mather & Barish, a	Represented By Michael S Kogan
MATHER KUWADA, a limited	Represented By Michael S Kogan
MATHER LAW CORPORATION,	Represented By Michael S Kogan

**Movant(s):**

Kajan Mather & Barish, a	Represented By Michael S Kogan
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**Plaintiff(s):**

A. Cisneros	Represented By D Edward Hays Chad V Haes Franklin R Fraley Jr Sue-Ann L Tran Jasmine W Wetherell
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**Trustee(s):**

Arturo Cisneros (TR)	Represented By Chad V Haes D Edward Hays
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Adv#: 6:15-01304 Cisneros v. Kajan Mather & Barish, a professional corporation

**#30.00** CONT Status Conference RE: [1] Adversary case 6:15-ap-01304. Complaint by A. Cisneros against Kajan Mather & Barish, a professional corporation, MATHER KUWADA, a limited liability partnership, MATHER LAW CORPORATION, a California corporation, LAW OFFICE OF KENNETH M. BARISH, Steven R. Mather, Kenneth M. Barish. (Charge To Estate \$350). for Avoidance, Recovery, and Preservation of Preferential and Fraudulent Transfers with Adversary Proceeding Cover Sheet) Nature of Suit: (12 (Recovery of money/property - 547 preference)), (13 (Recovery of money/property - 548 fraudulent transfer)), (14 (Recovery of money/property - other))

From: 12/30/15, 1/13/16, 3/30/16, 4/6/16, 5/4/16, 5/25/16, 9/28/16, 11/2/16

Also #28 & #29

EH\_\_

Docket 1

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Douglas J Roger, MD, Inc., A

Represented By  
Summer M Shaw  
Michael S Kogan  
George Hanover

**Defendant(s):**

LAW OFFICE OF KENNETH M.

Pro Se

Steven R. Mather

Pro Se

Kenneth M. Barish

Pro Se

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Kajan Mather & Barish, a      Represented By  
Michael S Kogan

MATHER KUWADA, a limited      Represented By  
Michael S Kogan

MATHER LAW CORPORATION,      Represented By  
Michael S Kogan

**Plaintiff(s):**

A. Cisneros      Represented By  
D Edward Hays  
Chad V Haes  
Franklin R Fraley Jr  
Sue-Ann L Tran  
Jasmine W Wetherell

**Trustee(s):**

Arturo Cisneros (TR)      Represented By  
Chad V Haes  
D Edward Hays